

**FILED**

APR 25 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, )

528

vs. )

MARGARET LOUISE WEST, )

8-680  
87-1635

Defendant-Appellant.)

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Appeal from the Iowa District Court for Linn County  
(CRF10272), Larry J. Conmey, Judge.

Defendant appeals her conviction of attempted murder  
after she allegedly shot her husband. **AFFIRMED.**

James E. Bennett and Charles C. Brown of Tom Riley Law  
Firm, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark  
Joel Zbieroski, Assistant Attorney General, for  
plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

The defendant, Margaret West, appeals her conviction of attempted murder after she allegedly shot her husband. She contends the trial court erred in several evidentiary rulings and in overruling her motion to suppress evidence obtained during two police searches. She also alleges a number of instances of ineffective assistance of counsel.

A jury found Margaret West guilty of attempted murder after hearing testimony that she shot her husband while he slept in the couple's bedroom. The defendant had told police and neighbors that the shooting was an attempted suicide by her husband. Additional facts are addressed in the body of the opinion.

On appeal, the defendant first contends the trial court erred by allowing her husband to testify concerning (1) the couple's relationship in past years, (2) her familiarity with the rifle involved in the shooting, and (3) whether there was any way he could have shot himself. She further urges the trial court erred in permitting testimony by a treating physician concerning the cause of the victim's confusion in the emergency room and by a second treating physician who offered hearsay evidence consisting of statements by the victim about whether he shot himself.

The defendant also asserts the trial court erred in overruling her motion to suppress numerous pieces of evidence obtained during two searches of the room where the

shooting occurred. She argues the first search, which was conducted without a warrant, was not justified by exigent circumstances or consent, and the second search was pursuant to a warrant issued on the basis of information acquired during the illegal first search.

Finally, defendant alleges thirty-seven specific instances of error by her trial attorney which cumulatively denied her effective assistance of counsel.

**I. The Motion to Suppress.** We do not find it necessary to determine the validity of the original warrantless search, which took place at the time of the incident, because we agree with the State that the independent source or inevitable discovery doctrines apply to the circumstances in this matter. See Murray v. United States, 47 U.S. \_\_\_\_, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

We initially determine whether the issuance of the search warrant was proper. For the purposes of our analysis, we assume the original warrantless search was not proper. In determining whether there is probable cause to issue a search warrant, the test is "whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime was being concealed there. . . ." State v. Post, 286 N.W.2d 195, 199 (Iowa 1979). Thus, in determining probable cause, a magistrate may draw reasonable inferences from the

facts presented. State v. Seiler, 343 N.W.2d <sup>531</sup>264, 267 (Iowa 1983).

The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. Nix v. Williams, 467 U.S. 431, 443, 104 S. Ct. 2501, 2508-2509, 81 L. Ed. 2d 377, 387 (1984). Our supreme court has addressed an analogous situation to the case at bar in State v. Groff, 323 N.W.2d 204 (Iowa 1982). There the affiant made a false statement in a search warrant affidavit. The court determined that the fourth amendment requires the statement be deleted from the affidavit, but the remaining contents are scrutinized to determine whether probable cause may still be established. Id. at 206. It is clear after reviewing the evidence here the prosecution has established evidence sufficient to comply with the independent source doctrine.

The search warrant had been obtained by the police based not only on the evidence that was discovered in the bedroom of the residence, but also on the nature of the victim's injuries, the victim's statements, and the defendant's statements. The police discovered powder burns on the fingers and the back of the victim's left hand, and a wound to the left index finger. There also were wounds to the victim's jaw and his upper right arm. It took little deduction to reason these wounds could not have been

self-inflicted. We determine the victim's wounds, as well as his statements, were sufficient alone to establish probable cause from which a search warrant could have been issued. Therefore, reviewing the affidavit omitting any statements about evidence which may have been unlawfully obtained, we determine in any event, probable cause was established.

Still assuming for the purposes of our analysis the original search was unlawful, we must determine whether or not the evidence seized during the initial search should have been suppressed. The State argues the doctrine of inevitable discovery allows the admission of any evidence obtained during the initial search.

The "inevitable discovery rule" is an exception to the sixth amendment exclusionary rule. If the prosecution can establish by a preponderance of the evidence that unlawfully obtained evidence ultimately or inevitably would have been discovered by lawful means, the evidence is admissible. Nix v. Williams, 467 U.S. at 444, 1043 S. Ct. at 2509, 81 L. Ed. 2d at 387. We determine even if the evidence secured by police during the original search was unlawfully obtained, it would have been ultimately or inevitably discovered by lawful means. As we have pointed out above, the police were able to obtain a lawful search warrant; through this search warrant the evidence in the bedroom would have been inevitably discovered once the

search warrant was executed. Accordingly, ~~we~~ hold the trial court properly overruled the defendant's motion to suppress the evidence based on the claim her fourth amendment rights were violated by the search of the room where the shooting occurred.

**II. Evidentiary Objections.** Initially, we note the trial court has broad discretion over all evidentiary matters. State v. Van Rees, 246 N.W.2d 339, 346 (Iowa 1976). However, the discretion is a legal one and should not be exercised to exclude matters vital and proper to the defense of one accused. Id. These principles apply especially in cases where "defendant's liberty and reputation are in jeopardy." See State v. Chambers, 379 N.W.2d 600, 602-03 (Iowa App. 1985). To warrant reversible error, the defendant must make an unequivocal showing that the trial court abused its discretion and the abuse resulted in prejudice to her. Id. at 602.

**A. Testimony of Past Marital Difficulties.** Defendant first claims she is entitled to a new trial because the district court erred in permitting the State to ask the victim questions relating to the nature of his relationship with the defendant. The defendant claims such questions elicited evidence which was irrelevant and remote because the incidents occurred some ten years prior to the incident we are concerned with here and five years before the parties were married.

Clearly evidence is admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. State v. Wilson, 406 N.W.2d 442, 447 (Iowa 1987). An objection based on remoteness raises the question of relevancy. It is well settled, whether evidence which is otherwise relevant should be excluded because of remoteness is a decision which rests in the sound discretion of the trial court. State v. Sharkey, 311 N.W.2d 68 (Iowa 1981). We determine here the trial court did not abuse its discretion in overruling the defendant's objection.

B. Defendant next argues the district court erred in allowing the victim to state his opinion on whether defendant knew how to use the weapon involved in the shooting. Defendant cites Iowa Rule of Evidence 701, stating no foundation was laid to show the opinion was "rationally based on the perception of the witness, and helpful to a clear understanding of his testimony or the determination of a fact and issue."

The transcript reveals the victim was asked whether defendant knew how to use the rifle. The victim indicated he had shown defendant "how to load it and stuff." This statement was admissible opinion testimony and therefore the court did not abuse its discretion overruling defendant's objection.

C. Defendant next argues the trial court erred in allowing the victim to offer an opinion there was no way he could have shot himself. The victim was asked during trial if he ever thought of or had been shown any way he could have shot himself. Defendant objected, arguing the question called for an opinion which the court overruled. The State argues the victim's response indicating he had not been shown how he could have done it or had thought of any way he could have done it is simply not opinion evidence. We agree. Clearly, the victim's statements do not qualify as opinion, but merely the victim's personal knowledge of the facts as he understands them.

D. Finally, defendant argues the district court erred by allowing the victim's treating physician to offer "opinion and speculation" as to the cause of the victim's "confusion" following the shooting. Further, defendant argues the district court erred by admitting the inadmissible hearsay testimony of a second doctor.

First, regarding the confusion testimony, the physician testified: "he was--he seemed quiet, he seemed calm, he seemed confused." The county attorney then asked:

Q. And when you say he seemed confused, did he seem confused about any particular subject?

A. Okay, I should clarify that.

[Defense counsel] --Objection, Your Honor, I think we're going to get into some speculation here and also it would be violating the opinion rule as to what a witness meant by a statement.

The Court: Overruled. You may answer.

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[The physician then explained]: Excuse me. I didn't mean to indicate he was confused about where he was or what time it was or his orientation. I meant he seemed confused about what was going on, what happened to him.

We find from the foregoing, whether treated as lay or expert opinion, the physician's clarification was not only based on his perceptions, but was helpful to the clear understanding of his testimony. See Iowa R. Evid. 701 and 702. Accordingly, we find the trial court did not abuse its discretion permitting the treating physician to clarify what he meant when he stated the victim was confused.

Second, the defendant claims certain testimony of another doctor was inadmissible hearsay. The incident complained of is as follows:

Q. When you saw Mr. West initially, was it in the emergency room at the university hospital?

A. Yes.

Q. Did he appear to be able to communicate with you and understand what was happening?

A. Very easily.

Q. What did he tell you had happened?

[Defense counsel]: Objection, Your Honor, hearsay.

[County attorney]: It's offered under the medical exception.

THE COURT: Overruled.

A. Mr. West directly said to me, "they said that I shot myself." In that time in the emergency room and in the following days afterwards, he questioned both Dr. Primly and myself and asked

us if we thought that he could have done this to himself.

Our review indicates substantially the same evidence was admitted at trial without objection. As we have held, there is no prejudice in admitting hearsay where substantially the same evidence is in the record without objection. State v. Whitfield, 315 N.W.2d 753 (Iowa 1982). Moreover, admission of hearsay evidence over proper objection is not reversible error when the record demonstrates that the "challenged evidence did not impact on the jury's finding of guilt." State v. Miss, 357 N.W.2d 608 (Iowa 1984). Therefore, we determine the trial court did not commit reversible error.

**III. Ineffective Assistance of Counsel.** The defendant alleges thirty-seven specific instances of error by her trial attorney which cumulatively denied her effective assistance of counsel at trial.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney an opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is inadequate record for us to adjudicate the defendant's claims without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

**AFFIRMED.**