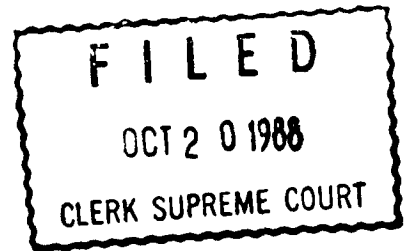


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
LUKE MARTIN, JR.,)
Defendant-Appellant.)

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8-67
87-115

Appeal from the Iowa District Court for Polk County
(32705), Joel D. Novak, Judge.

Defendant appeals his conviction of second-degree
murder. **AFFIRMED.**

Raymond Rogers, Acting Chief Appellate Defender, and
James R. Huff, Assistant Appellate Defender, for the
defendant-appellant.

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

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant appeals his conviction of second-degree murder. He claims the district court erred in refusing to permit an eyewitness to the shooting testify that in her opinion the shooting was accidental. Defendant asserts that such testimony is permissible lay opinion testimony under Iowa Rule of Evidence 701. Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. We affirm.

At trial, Elsie Harvey, the sole eyewitness to the shooting, testified that prior to the shooting, she had been dating the victim, Brent Peterson, for the previous two months. However, on the night before the shooting, she had been with the defendant, Luke Martin.

She testified that she and Martin arrived back at her apartment at approximately 3:00 a.m. and that Peterson was waiting for her. Martin subsequently left and Peterson spent the evening with Harvey. Martin returned the next morning at approximately 10:00 a.m. to pick up his niece, who lived next door to Harvey. Harvey further testified:

A: [E]arlier in the morning while the kids were still outside and Luke hadn't come into my house yet, he had told my daughter, Renae, that her mother was an idiot. We were joking back and forth and when he came over to get Christina he called Christina Teresa and I asked him who Teresa was. He said, "Well, isn't that her name?" I said, "You don't even know your own niece's name and you are calling me an idiot," and at that Brent said, kind of under his breath, what an asshole. He was just joking.

Q. Referring to who? A. Luke. And Luke came up the stairs and knocked Brent down into the chair and when Brent got back up, the next thing I know there was a gun in Brent's face and it went off.

Q. Prior to Luke knocking Brent down did Luke make any statements? A. Not that I remember.

Q. You ever testify in the past that he had made a statement? A. Yeah. He asked Brent what he said and Brent said, "Nothing. Never mind."

Q. Then what did Luke say? A. That's when Luke knocked him down and Luke said something to the effect of watch your mouth or I'll shoot your ass.

Q. Is that before or after Luke knocked Brent down? A. I think it was after.

Q. Did Luke say anything before knocking Brent down? A. I'm not real sure of the sequence of the events.

Q. Did Brent start to get up? A. Yeah. Brent got back up and the next thing I really remember clear is Luke standing right--right in front of Brent. I think he had a hold of his shirt or something and he had the gun in Brent's face and then the gun went off.

* * *

During a conversation with a state investigator, Harvey stated that the shooting appeared to her to be an accident. Prior to trial, the State moved in limine to exclude such opinion testimony, and the court sustained the motion over defense counsel's objection. The court reconsidered the motion during trial and it was sustained a second time. A jury subsequently found Martin guilty of murder in the second degree, and guilty of carrying a weapon.

Martin claims that the trial court erred in failing to allow Harvey to opine that the shooting was accidental. The general rule in Iowa is one of liberality in the

admission of opinion evidence. State v. Hummell, 228 N.W.2d 77, 82 (Iowa 1975). The decision as to the admissibility of such testimony rests in the discretion of the trial court, and we will reverse only on a clear showing of abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

We conclude the trial court properly excluded Harvey's testimony. It is true our rule of evidence 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

But her testimony is excluded not because it goes to the ultimate issue, but because such testimony is an opinion of a mixed question of law and fact. Such testimony violates the rule that a witness may not express an opinion on a question of law or mixed law and fact. State v. Ninmo, 247 N.W.2d 228 (Iowa 1976); State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976). The principle is expressed in Grismore v. Consolidated Products Co., 232 Iowa 328, 376, 5 N.W.2d 646, 663 (1942).

In Grismore, the court held that if a matter before a tribunal for determination is one in which opinion testimony is necessary or proper:

[T]he witness may express his opinion either as to the possibility, probability, or actuality of the matter of fact about which he is interrogated, and the answer will not be an invasion or usurpation of the province of the jury, even though it passes upon an ultimate fact which the jury must determine.

Id. Thus, in Speed v. State, 240 N.W.2d 901 (Iowa 1976), a witness was permitted to testify that a physician failed to use ordinary skill. In this respect, the Speed court stated, "But our cases and other authority clearly show that an opinion is not improper merely because it goes to the 'ultimate issue.'" Id. at 911. However, the court went on to say, "Plaintiff's counsel did not ask the expert what the decision in the case should be or whether the doctors who saw plaintiff were 'negligent.'" Id. Had those questions been asked, the testimony would have been properly excluded. As it relates to opinion testimony, the court in Grismore further said:

Of course, we are not to be understood as saying that opinion testimony should be received as to all matters. It should be received only as to such matters as are proper subjects of opinion testimony. No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible, or that a person was negligent or not negligent, or that he had capacity to execute a will, or deed, or like instrument, or as held by us in Halligan v. Lone Tree Farmers Exchange, 230 Iowa 1277, 1283, 300 N.W. 551, respecting whether the county attorney had probable cause to believe the plaintiff was guilty of the crime charged. But the reason is that such matters are not subjects of opinion testimony. They are mixed questions of law and fact. When a standard, or a measure, or a capacity has been fixed by law, no witness, whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question measures up to that standard. On that question the court must instruct the jury as to the law, and the jury must draw its own conclusion from the evidence. However, courts have permitted both scientific and practical experts to express their opinion whether certain method used, or course of conduct, was a proper one.

Grismore, 232 Iowa at 361, 5 N.W.2d at 663.

For a collection of authorities that have applied the Grismore rule, see State v. Moses, 320 N.W.2d 581, 587-88 (Iowa 1982).

It is clearly the law in this state that a question asking an opinion of law or of mixed law and fact (requiring application of the legal standard to the facts) may not properly be put to a witness. Grismore, 232 Iowa at 361, 5 N.W.2d at 663. Nor may a witness, regardless of his expertise, give an opinion on matters of domestic law. Thus a witness may not testify that a certain structure violates a zoning ordinance, M. CAPP Mfg. Co. v. Hartman, 260 Iowa 24, 148 N.W.2d 465 (1967); or whether a testator was competent, In re Ransom's Estate, 244 Iowa 343, 57 N.W.2d 89 (1953); or how a certain blood alcohol level compared to the statutorily-prescribed level, the presence of which constitutes presumptive evidence of intoxication, State v. Droste, 232 N.W.2d 483 (Iowa 1975).

It is equally clear that a witness may not give an opinion as to whether a defendant was negligent. The reason for precluding this type of opinion testimony was ably explained by the late Justice Harvey Uhlenhopp in his dissenting opinion in State v. Ogg, 243 N.W.2d 620 (Iowa 1976):

As a further example, a witness may not state, "defendant was, in my opinion, negligent"--since the word "negligent" has a special legal meaning [citations]. Such testimony is improper for two reasons. First, the witness' understanding of the

word "negligent" may not be the same as the legal definition--in which case the jury is implicitly being given an erroneous definition, by application, of the word "negligence." This possibility of confusion of meanings is stressed in McCormick, Evidence (2d ed.) § 12 at 28-29. See also Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex. 1964) (doctor held incompetent to testify that testator suffered an insane delusion--"a doctor's concept of what constitutes an insane delusion may be quite different from the legal concept").

Second, even if the witness' concept of the term ["negligence," "held for delivery," "probable cause," and so on] is the same as the legal concept, a witness arguably should not be allowed to answer a question including such a term, and thereby applying a legal standard to the facts, when under our system the judge instructs the jury on the law.

State v. Ogg, 243 N.W.2d at 623 (Uhlenhopp, J., dissenting).

And so in the case before us, we conclude that Harvey is unable to give her opinion that the shooting was an accident since the word "accident" has a special legal meaning. This testimony as Justice Uhlenhopp points out is improper for two reasons. First, the witness's understanding of the word "accident" may not be the same as the legal definition, and second, even if the witness's concept of the term "accident" is the same as the legal concept, a witness arguably should not be allowed to answer a question including such a term and thereby apply a legal standard to the facts when under our system the judge instructs the jury on the law.

A case somewhat similar to ours is State v. Leahy, 243 Iowa 959, 54 N.W.2d 447 (1952), where the issue was defendant's purpose in withdrawing a gun from his holster. The question on appeal was whether an eyewitness could express an opinion on whether defendant withdrew his gun to shoot or surrender it. Leahy, 243 Iowa at 968-69, 54 N.W.2d at 453. The supreme court held, "Defendant's purpose in withdrawing the gun could not be the subject of opinion testimony of another." Id.

Other jurisdictions using a slightly different approach have excluded testimony expressing an opinion as to whether a shooting was accidental. In State v. Parks, 71 Or. App. 630, 693 P.2d 657 (1984), the court considered defendant's assignment that the trial court erred when it struck the testimony of defendant's wife, a witness to the shooting, that it was "an accident." The appellate court concurred with the trial court when it allowed the witness to testify to her objective perceptions of the events but approved the following statement by the trial judge with regard to the stricken testimony:

I see it as analogous to the question in a civil action, "In your opinion was the defendant negligent?" and that's objectionable, not because it's the ultimate issue to be determined by the jury, but because the witness is not better able than the jury to reach a conclusion on that issue.

We note that the State of Oregon has rules identical to our Rules of Evidence 701 and 704.

We do not believe that either rule of evidence 701 or 704 is of any help to the defendant as he urges on appeal. The commentary to rule 704, which we have set forth above, states:

This section is consistent with Iowa law. See e.g. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942). Note, however, that while this section in prior Iowa case law abolishes the so-called ultimate issue rule, testimony from experts is not without limitations. Experts are not to state opinions as to legal standards. On this basis, questions such as whether "X" was negligent or whether a product was unreasonably dangerous may be excluded. Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 930 (Iowa 1978).

The main thrust of defendant's appeal rests on rule 701. That rule provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

We also note the following commentary under rule 701:

Rule 701 is virtually identical to the present statement of the Iowa rule regarding opinion testimony by lay witnesses. See e.g. Meeker v. City of Clinton, 259 N.W.2d 822, 831 (Iowa 1977) (citing rule 701 with apparent approval); see also Wadle v. Jones, 312 N.W.2d 510, 515 (Iowa 1981). Adoption of the rule should not effect any change in Iowa law.

Rule 701 requires that the lay opinion be helpful before it is admitted. In addition, the rule limits opinions to those which are "rationally based on the perception of the witness." We conclude that this

limitation excludes non-percipient lay opinion on questions such as negligence, whether an act was intentional or accidental, or whether a person is guilty or not guilty.

The significant issue here is whether the killing was an accident. The excluded opinion testimony centered around a point that was the main focus of the trial--whether defendant killed Peterson with intent or by accident. An opinion that the shooting was an accident, is an opinion on an issue of law, or a mixed question of law and fact.

The trial court was correct in excluding the testimony. Whether the shooting was an accident was a matter for the jury to determine from all the facts. As the trial court found, the jury is as capable as the witness of reaching a conclusion based on the witness's objective perceptions of the shooting. We agree.

AFFIRMED.

Schlegel, P.J., dissents; Sackett, J., specially concurs.

I respectfully dissent. The majority compares the characterization of the word "accident" in the same context as the word "negligence," which it is said has a clear legal meaning. Hence, to allow a witness to testify that an act constituted negligence may very well not only be an opinion on the ultimate question, but also is an opinion of mixed fact and law. Such an opinion is clearly improperly allowed. The problem in this case, however, is that the word "accident" or "accidental" does not have a clearly defined meaning at law, and unless the witness is allowed to express her opinion as to the accidental nature of the shooting, we are left with the raw evidence of the shooting and nothing more. Under those circumstances, the defendant is without his only defense witness, excepting for himself.

I would reverse and remand for a new trial and would require that the opinion be permitted. Accordingly, I dissent.

SACKETT, J. (specially concurring)

I concur specially. I agree the admission of the opinion testimony is within the trial court's discretion and I find no abuse of discretion.