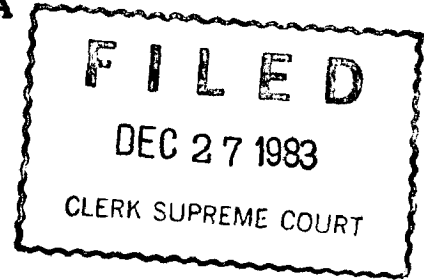


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA)
 Plaintiff-Appellee,)
 vs.)
 JAMES JOSEPH COSTELLO,)
 Defendant-Appellant.)

3-328
 68979

Appeal from Cerro Gordo District Court - Ralph F. McCartney, Judge.

Defendant appeals from his conviction of murder in the second degree.
 AFFIRMED.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant
 Attorney General, from plaintiff-appellee.

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Heard by Oxberger, C.J., and Snell, and Sackett, JJ.

SACKETT, J.

Costello appeals from his conviction of murder in the second degree in violation of Iowa Code sections 707.1 and 701.3 (1981). We affirm.

The defendant was originally charged with first-degree murder in the shooting death of Lloyd Lindsley. The defendant admitted that he shot Lindsley but claimed that the shooting was done in self-defense.

Evidence was presented at trial that Lindsley was angry with the defendant and wanted money which he claimed the defendant owed him. The defendant and Lindsley had a meeting at defendant's home on February 16, 1982. According to the defendant an argument developed between them after he refused Lindsley's request that he dive off the Florida coast to recover a capsule filled with cocaine. The defendant testified that, after Lindsley pointed a .38 caliber revolver at the defendant, he shot Lindsley with a .45 caliber weapon in self-defense. The defendant also presented evidence that Lindsley was quick-tempered, normally carried a gun, and that he had threatened the defendant.

Walter Reindl, captain of detectives of the Mason City police department, conducted the investigation into the crime. He testified about the discovery of the gun used in the shooting and the .38 caliber gun. Reindl further related that the defendant told him about the circumstances leading up to the crime and, specifically, that Lindsley wanted the defendant to dive off the Florida coast to recover a capsule filled with cocaine.

On cross-examination Reindl was asked whether he requested that trace metal detection tests be conducted on the .38 caliber gun allegedly used by Lindsley. The state objected to the question on the grounds that it was outside the scope of direct examination. The trial court sustained the objection. The defendant also asked Reindl whether there had been an investigation concerning the possible existence of a capsule filled with cocaine off the Florida coast as

alleged by the defendant. The state objected to the question on the basis that it was improper cross-examination and outside the scope of direct examination. The trial court sustained the objection.

Defendant's ex-wife, as a rebuttal witness for the state, testified that when she was married to the defendant he owned a .38 revolver. On cross-examination she stated that she could not remember what the .38 caliber gun looked like, and that she could not identify the .38 caliber gun introduced into evidence as the defendant's gun. She admitted that she told an investigator that the defendant's gun she had seen was sawed off but could not recall if it was a .38 or a .22 caliber gun. The defendant sought to introduce the testimony of the investigator. The defendant offered a professional statement as to what the investigator's testimony would be. He stated that the investigator would relate that during an interview with defendant's ex-wife, she was shown a picture of the .38 revolver introduced into evidence and that she told the investigator that it was not the weapon owned by the defendant, since his .38 revolver had a sawed-off barrel. Defense counsel indicated that he was offering the testimony for impeachment purposes. The state objected to the testimony as being improper for impeachment purposes because of a lack of foundation and because the testimony was collateral. The trial court sustained the objection.

During the trial the defendant moved for a judgment of acquittal on the basis of his claim of self-defense. The trial court overruled the motions and submitted the case to the jury. On July 15, 1982, the jury found Costello guilty of murder in the second degree. On August 5, 1982, after overruling defendant's motions for a new trial and in arrest of judgment, the trial court sentenced Costello. Notice of appeal was filed August 6, 1982.

On appeal Costello claims: (1) that the trial court erred in unduly limiting his cross-examination of a state's witness; (2) that the trial court erred in failing to allow him to present surrebuttal testimony; and (3) that the evidence was insufficient to support his conviction.

I. Cross-examination

During the cross-examination of officer Walter Reindle, defense counsel asked him whether he had arranged for trace metal detection tests to be run on the .38 caliber gun recovered at the scene. Reindle was also asked whether, in the course of his investigation in Florida, he had attempted to investigate the allegation that Costello had planned a dive for a capsule containing cocaine located off the Florida coast. The state objected to both questions as being improper and beyond the scope of direct examination. The trial court sustained the objections. Costello now argues that the trial court erred in so restricting his cross-examination.

While reasonable latitude must be afforded a cross-examiner, the scope thereof as to any proper subject of inquiry rests generally in the trial court's sound discretion. State v. Durrell, 300 N.W. 2d 134, 137 (Iowa 1981). The trial court's discretion in this respect is a legal discretion and should not be exercised so as to exclude matters vital and proper to the defense of one accused. State v. Carney, 236 N.W. 2d 44, 46 (Iowa 1975). We recognize that the scope of cross-examination of a state's witness should be extended liberally on behalf of a defendant charged with a grave offense. Id. Nevertheless, the scope of cross-examination is limited to (1) matters inquired into on direct examination, or (2) matters which pertain to the witness's credibility, bias, ill will, hostility or interest in the case. State v. Cuevas, 288 N.W. 2d 525, 530 (Iowa 1980).

Here we are concerned only with whether the cross-examination was aimed at a matter touched upon in the direct examination.

A. Trace metal detection tests

The record reveals the following testimony by officer Reindl on direct examination regarding the .38 caliber gun: that the weapon was next to the sink covered by a towel; that the weapon was a snub-nosed revolver; and that he never handled the weapon. On the record before us, we cannot say that the trial court

abused its discretion in sustaining the state's objection to defense counsel's cross-examination. Whether Reindl had arranged for trace metal detection tests to be run on the weapon clearly went beyond any matters inquired into on direct examination.

Even had the cross-examination inquiry into the trace metal detection tests been properly within the scope of direct examination, we would be compelled to find no prejudice. The trial transcript reveals that Officer Reindl had already testified on cross-examination as follows:

Q. Did you arrange to have — strike that. Did you arrange to have the .38 recovered in the kitchen area of the apartment sent to the DCI laboratory in Des Moines?

MR. TOMPKINS: Your Honor, I'm going to object as being improper cross-examination, not having gone into on direct.

THE COURT: Overruled. He may answer.

A. Did I arrange for it?

Q. Yes, sir. A. No. That was done by Detective Jewell.

Q. Did you oversee his operation of taking care of those matters? A. I didn't come in daily and check to see what he had done, no. He knew what he had to do, and he did it.

Q. Do you know how long it was before the .38 was sent to the Department of Criminal Investigation laboratory in Des Moines.? A. No, I don't. It had to be sent and Jewell did it and that's all I can tell you. I don't know when it was sent down there.

Because Officer Reindl had already testified that he had not sent the .38 to the DCI laboratory, we find no prejudicial error in the trial court's subsequent limitation on cross-examination in response to defense counsel's inquiry into trace-metal detection testing.

B. Florida investigation

A review of the record reveals the following testimony by officer Reindl on direct examination regarding the Florida investigation: that on the night of the crime Costello told police that the victim wanted Costello to do a job for him which involved recovering a torpedo or capsule-shaped cylinder filled with cocaine in Florida; that Costello told police that he turned down the deal; and that a fight followed during which the victim was fatally shot. We note that at no time during his direct examination did officer Reindl testify that he went to Florida in connection with the case. We cannot say that the trial court abused its discretion in limiting cross-examination with respect to any Florida investigation.

II. Surrebuttal testimony

Costello's ex-wife, Paulette Grell, was called by the state as a rebuttal witness. She testified on direct examination that, during the time she was married to Costello, he owned a ".38 revolver pistol weapon." Grell was not asked on direct examination to describe the weapon. On cross-examination, defense counsel asked Grell if the .38 owned by her ex-husband was that revolver introduced as State's Exhibit 8. Grell responded that she did not remember what it looked like, but that she knew that Costello owned a .38. Grell was then asked if there was anything unusual about the .38 owned by Costello. Grell responded that Costello had several guns and that she didn't pay any attention to the guns. The questioning proceeded as follows:

Q. Isn't it true that you told me and Mr. Gordon Gracious that the gun that you saw had been sawed off? A. One of his guns was.

Q. And was that the .38 revolver that you testified as seeing? A. I don't know if it was a .38 or a .22. He had so many guns.

Q. You don't know whether -- you don't know whether you've ever seen that weapon before, State's Exhibit 8, then; is that correct?

MR. TOMPKINS: Your Honor, I object as being repetitive again.

THE COURT: Yes, it is, and the objection is now sustained.

Defense counsel then sought to introduce a statement made by Gordon Grattias regarding Grell's prior statements about the .38 for the purpose of "impeaching her prior testimony." The state objected, arguing that the defense laid no proper foundation for impeachment testimony, and further that the evidence of the prior statement was collateral. The court ruled that, whether collateral or not, there was not a sufficient foundation for the use of such a statement in surrebuttal for the purpose of impeaching Grell. Costello now argues on appeal that the trial court abused its discretion in failing to allow the surrebuttal testimony to be presented.

Rebuttal evidence explains, repels, controverts, or disproves evidence produced by the other side. State v. Webb, 309 N.W. 2d 404, 411 (Iowa 1981). Evidence which has no direct tendency to impeach, contradict, explain or otherwise rebut evidence is not normally admissible on rebuttal. State v. Walker, 218 N.W. 2d 915, 919 (Iowa 1974). The trial court has considerable discretion in ruling on the admission of rebuttal evidence and the exercise of that discretion will be reversed only upon a showing of abuse of discretion. Id; State v. Hansen, 225 N.W. 2d 343, 351 (Iowa 1975). We find no such abuse of discretion in this case. Grell testified that she did not remember what Costello's revolver looked like, and therefore made no testimonial statement with which her prior statement could be inconsistent. See State v. Gilmore, 259 N.W. 2d 846, 857 (Iowa 1977). Because the proffered surrebuttal evidence would have no direct tendency to impeach Grell's rebuttal testimony, the trial court properly refused to admit such evidence. See State v. Walker, 218 N.W. 2d at 919.

III. Sufficiency of evidence

Costello argues that the trial court erred in failing to sustain his motions for a directed verdict because there was insufficient evidence to sustain his conviction. In considering this argument, we must look at the evidence in the light most favorable to the state. Iowa R. App. P. 14 (f)(2). If there is substantial support for the verdict in the record, the jury verdict is conclusive. State v. Jones, 271 N.W. 2d 761, 763 (Iowa 1978). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Robinson, 288 N.W. 2d 337, 339 (Iowa 1980).

The crime of murder in the second degree requires proof that the defendant intentionally, with malice aforethought and without justification caused the death of another. Iowa Code §§707.1, 707.3 (1981). In this case, since Costello advanced a claim of self-defense, the state was required to prove beyond a reasonable doubt that the shooting was without justification. State v. Mayes, 286 N.W. 2d 387, 392 (Iowa 1979). To establish there was no justification the state had to prove:

- (1) The defendant was the provocator in initiating or continuing the difficulty which resulted in the shooting; or
- (2) the defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him; or
- (3) he did not have reasonable grounds for such belief; or
- (4) the force used was unreasonable.

Id. at 392-93. The state had to show only one of these four alternative propositions to prove that the defendant was not justified in the act. Id. at 393. What particular facts will justify a self-defense killing is a question of law for the trial court; the existence of such facts, however is a question for the jury. State v. Beyer, 258 N.W. 2d. 353, 357 (Iowa 1977). Furthermore, the jury, not the court, is to judge the credibility of witnesses. Id.

In the instant case trial testimony regarding the confrontation that culminated in the killing, and whether Costello actually and reasonably believed himself in imminent danger, did create fact issues. The issue of justification was essentially one of credibility. Costello's testimony on his own behalf was the only direct evidence presented regarding justification. The state, however, did present circumstantial evidence to support its theory that the killing was unjustified. The jury, in weighing the evidence presented, could have found that Costello was not a credible witness and could therefore have discounted his testimony. There was substantial evidence upon which the jury could have found a lack of justification. Because there is substantial support for the verdict in the record, the jury verdict is conclusive. The trial court correctly overruled defense motions for a directed verdict.

Because the defendant's arguments lack merit, we affirm the judgment below.

AFFIRMED.