FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

BILLY GENE HEUMPHREUS,

Appellant.

Filed April 28, 1978

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60660

Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Defendant appeals his conviction for manslaughter, a violation of § 690.10, The Code 1975, claiming trial court error in several specifications. Affirmed.

Dell A. Richard and Glenn Muller, of Oehler, Radig, Hoy, Muller & Richard, P.C., Iowa City, for appellant.

Richard C. Turner, Attorney General, Lona Hansen, Assistant Attorney General, and Jack W. Dooley, Johnson County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Billy Gene Heumphreus was charged with murder, § 690.1, The Code 1975, and convicted of manslaughter, a violation of § 690.10, The Code 1975. On appeal he has raised four contentions which he insists require reversal and the grant of a new trial. We deal with the issues in the order briefed.

I. Defendant first complains that trial court unduly restricted his cross-examination of the prosecution witness Theresa Heumphreus. Trial court sustained objections to several questions on the basis that they were argumentative. Scope of cross-examination is left to the sound discretion of trial court. State v. Carney, 236 N.W.2d 44 (Iowa 1975); State v. Droste, 232 N.W.2d 483, 489-90 (Iowa 1975). The present case is unusual in that scope of cross-examination issues ordinarily arise from the sustaining of objections that questions are irrelevant, go to collateral matters or go beyond the scope of direct examination. The remedy for a party whose question is found to be argumentative should be a rephrasing of the question, or a restructuring of the examination, or even a change in tone of voice or manner of speaking. The argumentative objection goes to the form of a question, not to its substance. It is not, therefore, a vehicle which normally limits the scope of examination. See generally Wander v. Brady, 252 Iowa 183, 189-90, 105 N.W.2d 86, 91 (1960); E. Cleary, McCormick's Handbook on the Law of Evidence § 7 (2d Ed. 1972); 98 C.J.S. Witnesses § 328b(5) (1957). Trial court did not abuse its discretion in barring the questions in controversy as argumentative.

Nor did trial court's rulings have the effect of improperly restricting the scope of cross-examination. The point which defense counsel sought to make, that possible inconsistencies existed among the witness's accounts of the fight made before and during the trial, was adequately presented to the jury. Cf. State v. Van Rees, 246 N.W.2d 339, 345-47 (Iowa 1976); see also Berding v. Theda, 243 N.W.2d 857, 860-61 (Iowa 1976).

II. Defendant next contends that trial court erred in failing to grant a mistrial when Robert Carpenter, a Johnson County deputy sheriff, appeared in uniform to testify. Prior to trial, counsel had agreed that all peace officers would testify in civilian clothing. The parties are agreed that Carpenter's appearance in uniform was inadvertent on the part of both the officer and the prosecutor.

Trial court has wide discretion in granting or denying a motion for mistrial. Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). The appearance of Officer Carpenter in uniform was not so prejudicial as to require the declaration of a mistrial. Cf. Dougherty v. Boyken, 261 Iowa 602, 610-11, 155 N.W.2d 488, 492-93 (1968); Miles v. State, 336 P.2d 930, 932 (Okla. Crim. App. 1959).

III. In his third assignment defendant argues trial court erred in admitting certain items of physical evidence, the knife used to kill decedent and clothing worn by defendant and decedent at the scene of their confrontation, without showing the complete chain of custody. A gap in that chain was created when Thomas Randolph was not permitted to testify because his name had not been endorsed upon the information.

The question is whether trial court abused its discretion in admitting the evidence. State v. Lewis, 242 N.W.2d 711, 725 (Iowa 1976). Of course, a showing of the chain of custody is not the exclusive means of laying a foundation for admission of objects involved in the controversy. Such objects may also be admitted on the basis of testimony that they are in substantially the same condition at the time of trial as immediately after the occurrence out of which the litigation arises. Neel v. Smith, 147 N.W. 183, 184 (Iowa 1914); McCormick, supra § 212, p. 527; see generally 32 C.J.S. Evidence § 607 (1964). The State need not negate every possibility that an object has been tampered with. Cf. State v. Jeffs, 246 N.W.2d 913, 915 (Iowa 1976); see 32 C.J.S. Evidence § 607, p. 766 (1964). The possibility of alteration should be considered in determining the weight to be given the evidence. State v. Lewis, 242 N.W.2d at 725. There was evidence in the record indicating the items in controversy were in the same condition as when obtained by law enforcement personnel. Trial court did not abuse its discretion by admitting the evidence on that basis. See also State v. Hollins, 184 N.W.2d 676, 679 (Iowa 1971); State v. Galvan, 181 N.W.2d 147, 151 (Iowa 1970).

IV. In his final division, defendant insists that instruction 22 did not adequately inform the jury on self-defense. Specifically, his complaint is the jury was instructed that to avail himself of self-defense an aggressor must withdraw from combat and that the jury was not told that an attempted withdrawal could be adequate. He describes the language of the instruction as "harsh" and "absolute." We are unable to agree.

We are not persuaded that State v. Fisher, 246 N.W.2d 918 (Iowa 1976) stands for the proposition that an aggressor may restore his right of self-defense by merely attempting to withdraw from combat. That a withdrawal will revive the right of self defense seems clear. See State v. Whitnah, 129 Iowa 211, 105 N.W. 432 (1905); State v. Smith, 99 N.W. 579 (Iowa 1904). Despite defendant's attempt at distinction, the difference between an attempted withdrawal and an accomplished withdrawal is not critical. The essential question in such cases is whether the aggressor gave the decedent adequate notice of his intention to withdraw. See e.g., Dodson v. State, 284 P.2d 437, 441 (Okla. Crim. App. 1955), quoting Boutcher v. State, 4 Okla. Crim. 576-77, 111 P. 1006, 1007 (1910); Jackson v. Commonwealth, 257 Ky. 75, 78, 77 S.W.2d 380, 381 (1934); Annot. 55 A.L.R. 3d 1000, 1004-08 (1974); 1 Anderson, Wharton's Criminal Law and Procedure § 232, p. 505 (1957); 1 Warren & Bilas, Warren on Homicide, § 152, p. 699 (1938); 40 C.J.S. Homicide § 121, p. 996 (1944). The difference between withdrawal and attempted withdrawal is one of degree, not of kind. The withdrawal (or attempt to withdraw) is to be measured by the standard of whether it informed the decedent of defendant's intention to abandon combat. The instruction complained of adequately informed the jury of that standard.

All assignments of error have been considered and found to lack merit.

AFFIRMED.