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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)
Appellee,) Filed November 10, 1977
vs.)
FRANK E. CASUSO,) 274/59385
Appellant.)

Appeal from Scott District Court - Lowell D. Phelps, Judge.

Defendant appeals conviction on a sodomy charge in violation of § 705.1, The Code, on the ground that the prosecution's cross-examination violated § 781.13, The Code. AFFIRMED.

Jorge Gomez, Jr., of Gomez, Feuerbach & Olvera, of Davenport, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Lee M. Jackwig, Assistant Attorney General, and A. Fred Berger, Jr., Assistant Scott County Attorney, counsel for appellee.

Submitted to Allbee, C. J., and Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Frank Casuso appeals his conviction on a sodomy charge in violation of § 705.1, The Code. Casuso initially contends that the trial court lacked jurisdiction over him on the sodomy charge. However, during the pendency of this action this issue was decided adversely to Casuso. State v. Casuso, 253 N.W.2d 919, 920 (Iowa 1977).

Defendant's other contention is that the State's cross-examination was improper and prejudicial in that it exceeded the scope of direct examination, in violation of § 781.13, The Code. During direct examination Casuso testified concerning his general background and a psychological testing procedure involving a color book which he, as an amateur, administered to interested inmates. However, this record clearly demonstrates that the defendant took the stand in his own behalf merely for "window dressing" purposes. His testimony consisted of self-serving declarations about the manner in which he was persecuted by the Communists in Cuba, his satisfactory family background, and his educational achievements, including his work in the psychological testing area. It was this line of questioning regarding testing and counseling which precipitated the questions about the color book and other related subjects. Consequently, the defendant "walked" directly into this line of questioning and should not be allowed to complain now.

The cross-examination by the State regarding Casuso's association with another inmate, Tim Wales, which developed as a direct result of the administration of the test to Wales, was sufficiently related to the book and test and therefore did not violate § 781.13, The Code. During the cross-examination of Casuso, the following colloquy occurred:

> "BY MR. BERGER: "Q. Now, the time that you and Fred Schmidt took Timmy Wales into that cell, that had nothing to do with this test, did it?
>
> MR. DAVIS: I object, Your Honor; that's beyond the scope of direct examination.
>
> THE COURT: It's overruled. This has to do with the book and the test.
>
> THE WITNESS: Up to a point I would say it did, yes. . . .
>
> "Q. So therefore, you and Fred Schmidt taking Timmy Wales into that cell had nothing to do with your exhibit here, Defendant's Exhibit 'A', the test?
>
> A. Wrong. It did have something to do with it. Should I explain why?
>
> Q. It had something to do with it?
>
> A. Yes, that's what I tell you."

The prosecutor then proceeded to ask various questions regarding psychological testing, Wales, and the incident resulting in the sodomy charge. Defense counsel objected on the ground that the questions went beyond the scope of direct examination. In overruling the objection, the trial court noted that State v. Jensen, 189 N.W.2d 919 (Iowa 1971) only prohibits the prosecutor from "going into the very crux of the case which was the commission of the act which he was charged with having committed."

Casuso relies upon Jensen for the proposition that when a defendant testifies in his own behalf, the parameters of cross-examination are set by the nature of the questions asked on direct examination. He argues that since the questions asked here exceeded the scope of direct examination, Jensen mandates a reversal and new trial. However, Casuso's reliance upon Jensen is misplaced. That case held that where defendant on direct examination had testified only concerning events which occurred on a particular evening it was error to permit cross-examination which ranged back in time to show a prior course of dealing.

In Jensen, supra, at 923-924, the court announced the rule to be followed in subsequent cases:

> "... We do not mean to say the prosecutor can only parrot the questions propounded on direct. Cross-examination may deal with the matters inquired into on direct, and questions fairly within the area of those matters constitute proper cross-examination. As stated in 98 C.J.S. Witnesses § 395 at 175, cross-examination of an accused is not restricted to 'a mere categorical review of the matters stated in the direct examination, but may cover any matter referred to, or within the fair purview of, direct examination.' See also State v. Broten, 176 N.W.2d 827 (Iowa). Neither do we mean to erode the traditional discretion of trial courts in ruling on marginal questions during cross-examination. State v. Harrington, 178 N.W.2d 314 (Iowa); State v. Van Voltenburg, 260 Iowa 200, 147 N.W.2d 869." (emphasis added)

See, State v. Ivory, 247 N.W.2d 198, 201 (Iowa 1976); State v. Monroe, 236 N.W.2d 24, 29 (Iowa 1975).

The law is also clear that the manner in which, and the extent to which, cross-examination of a defendant may be pursued is largely a matter left up to the discretion of the trial court, and its ruling will be disturbed only upon a showing of a clear abuse of that discretion. State v. Ivory, supra, at 201; State v. Jensen, supra, at 924; State v. Broten, 176 N.W.2d 827, 828 (Iowa 1970). See State v. Sparks, 238 N.W.2d 777, 779 (Iowa 1976).

Having applied these legal principles to the instant case, we conclude that the trial court did not abuse its discretion in permitting the cross-examination which took place. Initially counsel for the State was entitled to ascertain the manner and extent to which defendant's testimony given on direct examination was material to the issue of his guilt or innocence. Once Casuso indicated that the evidence given on direct was an explanation for the victim's presence in his cell, further questioning to test this thesis was warranted.

In overruling defendant's motion for mistrial, the trial court noted that all of the State's questions on cross-examination were related to the color book and the association between Casuso and Wales which arose from defendant's use of the color book. We hold that this case presents one of those marginal situations described in Jensen, and therefore, we defer to the trial court's determination.

As to the question which Casuso asserts involved the ultimate issue regarding his guilt or innocence, we conclude that it did not. Moreover, this question was not answered and another question was substituted for it prior to defendant's objection. The objection was sustained by the trial court. This circumstance does not require a reversal of defendant's conviction. Consequently, we affirm the judgment of the district court.

AFFIRMED.

All judges concur except Snell and Oxberger, JJ., who dissent.

OXBERGER, J. (dissenting)

I believe the state's cross-examination was improper and prejudicial; and that it violated § 781.13, The Code 1975. During direct examination Casuso testified concerning his general background and a psychological testing procedure which he, as an amateur, administered to interested inmates. There was no testimony relating to the alleged occurrence giving rise to the sodomy charge. On cross-examination the prosecutor persistently asked:

> Q. You slapped him (Tim Wales) in the face? . . .
>
> Q. And were you aware of the fact that he (Wales) had taken two sleeping pills? . . .
>
> Q. But as Fred Schmidt said, you and he took Tim Wales into that cell to shake him up? . . .
>
> Q. But you did end up scaring him (Wales) and putting him into hysterics? . . .
>
> Q. . . . How, eventually while you had Timmy Wales in that cell, did you get him under control? . . .
>
> Q. Now, after getting him (Wales) to sit down I take it then you started to talk to him? . . .

The trial court overruled the defense counsel's objections that the questions went beyond the scope of direct examination. The trial court subsequently sustained an objection when the prosecutor asked Casuso ". . . And also to give in to acts of sodomy?" The trial court explained its rulings by stating that State v. Jensen, 189 N.W.2d 919 (Iowa 1971) only limits the prosecutor from "going into the very crux of the case which was the commission of the act which he was charged with having committed."

To the contrary, as I read **Jensen**, it established that when the defendant testifies in his own behalf the parameters of cross-examination are set by the nature of the questions asked on direct examination. If defense counsel asks the ultimate question of the defendant's guilt or innocence, the prosecutor may cross-examine regarding the whole matter of defendant's guilt or innocence. But, if defense counsel's questions on direct deal only with specific matters and the defendant is not asked the ultimate question in the case on direct:

> . . . to allow the prosecutor to range over the whole question of guilt or innocence is to read out of the statute the restriction that cross-examination is limited to the matters inquired into on direct. Cross-examination may deal with the matters inquired into on direct, and questions fairly within the area of these matters constitute proper cross-examination. 189 N.W.2d at 923-24.

Under **Jensen** a defendant may testify so broadly on direct that he opens up the whole matter of his guilt or innocence and he may do so very briefly. 189 N.W.2d at 923. I find no such broad direct testimony in the instant case. Casuso's direct testimony consisted of general background inquiries and questions regarding the psychological testing procedure. Casuso's direct testimony made no reference to any particular occasion when Casuso administered his psychological testing and certainly no reference to an occasion during which Tim Wales was present in Casuso's jail cell.

The prosecutor questioned Casuso at length regarding the testing procedure: the book and color code cards he used, how it became known to the inmates that he was available for testing, and the requests he received for administering the test. These questions exhausted the matters inquired into on direct. It is the next question, "Now, the time that you and Fred Schmidt took Timmy Wales into that cell, that had nothing to do with this test, did it?" that exceeds the permissible bounds of Jensen. The prosecutor ranged beyond the direct testimony to establish that Timmy Wales and Fred Schmidt were in Casuso's cell. From there the prosecutor engaged in sustained questioning regarding the force, duress, drugged stupor and hysteria which accompanied Tim Wales' presence in Casuso's cell. Such cross-examination bore no relationship to matters inquired into on direct.

The court in **Jensen** began with an acknowledgment that its duty in an inquiry focusing upon a charge of violation of § 781.13 was "to observe the statute faithfully." 189 N.W.2d at 923. I believe a faithful observation of § 781.13 entitles Casuso to a new trial. It was error for the trial court to allow the prosecutor to range in cross-examination beyond the specific testimony relating to psychological testing on direct examination.

I would reverse and remand for a new trial.

Snell, J. joins in this dissent.