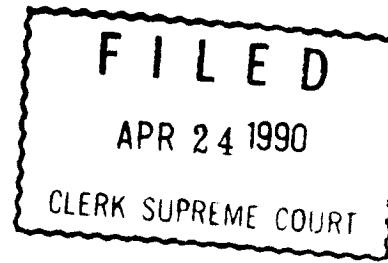


IN THE COURT OF APPEALS OF IOWA

No. 0-69 / 88-1601



STATE OF IOWA,

Appellee,

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vs.

YVETTE MARIE LOUISELL,

Appellant.

Appeal from the Iowa District Court for Story County,
Allan L. Goode, Judge.

Defendant appeals from her conviction, following a jury
trial, for first-degree murder. **AFFIRMED.**

Alfredo Parrish and Elizabeth Kruidenier, Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden,
Assistant Attorney General, and Mary Richards, County
Attorney, for appellee.

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

HABHAB, J.

Defendant Yvette Marie Louisell was a seventeen-year-old Iowa State University student who worked part-time as a model for a university art class. One of the students in the class was Ames resident Keith Stilwell, a paraplegic who walked with two canes or crutches and who had limited use of his hands.¹ After meeting defendant, Stilwell hired her on several occasions to do private nude modeling in his home. During one of these private modeling sessions defendant allegedly killed Stilwell and stole his credit cards. She was later apprehended while trying to make a purchase with one of Stilwell's credit cards.

Defendant was charged with first-degree murder. At her jury trial she testified she had stabbed Stilwell in self defense after he tried to rape her. She explained the credit card thefts by saying she was ashamed of the rape

1. Mr. Stilwell was forty-two years old at the time of his death. When he was seventeen years old, he was injured in a wrestling meet and paralyzed from the neck down for two months thereafter. He was rehabilitated to the extent that he was able to walk with two canes or with crutches. By using these aids, he could force his legs to move, although his toes dragged. He was unable to walk without the aid of canes or some solid object. He could not stand without balancing himself against something solid. A coworker observed him fall on two occasions. Each time he had difficulty getting back upright. When he would stand from a seated position, his body would involuntarily shake for several moments. His hands were permanently, though loosely, clenched. He had a very weak grip. The use of his fingers was limited. He was able to tighten his thumb, but not the rest of his hand. He was described by his neighbor as "fragile," his chores difficult.

attempt and tried to leave the appearance Stilwell's death occurred during a robbery.

The jury found Louisell guilty of first-degree murder. She has appealed from the resulting conviction. We affirm.

I. Jury Instruction. Defendant challenges the district court's instructions on the degree of force which is reasonable to use in self defense. She contends the instructions were erroneous because they instructed the jury to consider how a reasonable person would view the need for forcible self-defense under the circumstances existing at that time. She argues the instructions should instead have told the jury to consider how a reasonable person would view the need for forcible self-defense under the circumstances which existed to her at that time. She complains the language used by the court permitted the jury to apply an objective standard to the question of how much force was reasonable; she argues further the jury should have been instructed to consider how the alleged threat from Stilwell would have appeared to her subjectively at the time it was occurring.

"The test of justification is both subjective and objective." State v. Elam, 328 N.W.2d 314, 317 (Iowa 1982). See also State v. Nunn, 356 N.W.2d 601, 604 (Iowa App. 1984) (the test of justification involves both subjective and objective components). A defendant must actually believe he or she is in danger and that belief must be a reasonable one. Elam, 328 N.W.2d at 317.

The instructions in this case were in accordance with the prevailing case law. The jury was instructed on the definition of sexual abuse and that sexual abuse constituted a forcible felony. It was then instructed to consider whether defendant was using reasonable force against someone committing a forcible felony.

Instruction number 34 directed the jury to:

[C]onsider the force used by Defendant in the belief it was necessary to prevent a forcible felony from being completed from her standpoint, as a reasonable person would view it under the circumstances existing at that time. If the Defendant believed the force she used was necessary to prevent the felony from being completed and a reasonable person would see it in the same light, then this is sufficient even if the force used was not necessary. (Emphasis added.)

Instructions 39 and 40 incorporated similar language when directing the jury on the defense of justification when used to defend against any immediate use of an unlawful force.

Jury instructions 34 through 40 sufficiently instructed the jury to focus on the circumstances which existed at the time and the danger apparent from defendant's viewpoint. The jury was instructed to ascertain whether defendant actually believed she was in danger and whether that belief was reasonable. No error occurred in declining to place more emphasis on the personal subjective perceptions of defendant.

II. Surrebuttal. Defendant contends the district court erred in refusing to allow her the opportunity for surrebuttal. Defendant argues the district court erred by apparently concluding surrebuttal was unavailable under the applicable rules of procedure, and by concluding surrebuttal would be inappropriate here even if it were procedurally available.

It appears defendant sought the opportunity to present surrebuttal in response to statements made by the State in its closing argument. Those statements alluded to the genuineness of emotion and tears defendant displayed while testifying.²

It is within the trial court's discretion as to whether surrebuttal testimony will be allowed. See State v. Henderson, 268 N.W.2d 173, 180 (Iowa 1978); State v. Van Hoff, 371 N.W.2d 180, 186 (Iowa App. 1985), cert. denied, 474 U.S. 1034 (1985). From our careful review of the record, we cannot find an abuse of discretion in refusing defendant an opportunity for surrebuttal.

III. Motion to Suppress. Defendant contends the trial court erred in denying her motion to suppress with respect to statements she made over the telephone to her grandmother while at the police station. The police

2. In her brief defendant suggests she should have been given the opportunity for surrebuttal in response to the State's rebuttal evidence regarding Stilwell's physical strength and ability to stand. However, this court finds no support in the record to indicate defendant sought surrebuttal for this specific issue.

contacted Ms. Epps, defendant's grandmother and legal guardian, in order to obtain her consent to the questioning of defendant. See Iowa Code § 232.11(2) (1987). Ms. Epps was advised defendant had been arrested and was being held for using a stolen credit card.

At Ms. Epps' request, defendant spoke with her grandmother, and the police then overheard her make statements to her grandmother about finding a wallet with credit cards in it. Ms. Epps then resumed her conversation with the police and, after receiving assurances that her granddaughter would not be mistreated, she consented to police questioning of defendant. Defendant's statements to her grandmother were later used at trial.

The trial court, on grounds of violations of defendant's fifth-amendment rights and section 232.11(2) of the Code, suppressed admission of any statements defendant made in conjunction with questioning and interrogation by the police. Defendant's statements to her grandmother, however, were not suppressed as the trial court concluded the statements made in the presence of the police were not the product of police interrogation, and therefore were not subject to exclusion.

In her brief, defendant contends her statements to her grandmother were involuntary, were admitted in violation of provisions of the juvenile code, and were in violation of her sixth-amendment right to counsel. Taking this latter argument first, we note no adversarial proceedings had been

commenced against defendant at the time the statements were made. See State v. Nelson, 390 N.W.2d 589, 591 (Iowa 1986) (adversary proceedings are initiated by formal charge, preliminary hearing, indictment, information or arraignment). No issue exists with regard to a violation of defendant's sixth-amendment right to counsel.

The fifth amendment encompasses a dual test in determining the admissibility of inculpatory statements made by a criminal defendant. State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989). First, a court must determine if Miranda warnings were required and properly given; then a court must determine if the statements were voluntary and satisfied due process. Id.

A Miranda inquiry is required only in the case of custodial interrogation. Id. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom in a significant way. Id. The Miranda safeguards extend not only to express questioning but also to its "functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307-08 (1980). The "functional equivalent" of interrogation includes any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect. Id. at 301, 100 S. Ct. at 1689-90, 64 L. Ed. 2d at 308.

The record reveals defendant's statements about finding the wallet were not made in response to police questioning or interrogation. Defendant's statements were made to her grandmother to enable her to determine whether she would consent to police questioning of her granddaughter. Defendant's explanation and responses to her grandmother were in no way the product of police interrogation.

The circumstances surrounding defendant's phone conversation with her grandmother did not amount to the "functional equivalent" of an interrogation. Similar to the situation in Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987), the police were not a part of the conversation between defendant and her grandmother, and there was no evidence the officer's decision to allow defendant to speak to her grandmother was either a psychological ploy which could properly be treated as the functional equivalent of interrogation or was for the purpose of eliciting incriminating statements. Id. at 527-28, 107 S. Ct. at 1935-36, 95 L. Ed. 2d at 467.

Despite our conclusion that defendant's statements were not the product of police interrogation, the State must still prove the accused's incriminating statements were voluntarily given. We examine the totality of the circumstances to determine whether statements were the product of a free and unconstrained choice. Davis, 446 N.W.2d at 789.

Many factors bear on the issue of voluntariness. Id. Several factors to be considered are a defendant's age, experience, prior record, level of education, and intelligence. Id. It is also clear coercive police activity is a necessary predicate to finding a statement is not voluntary. State v. Vincik, 398 N.W.2d 788, 790 (Iowa 1987).

Defendant claims the statements made to her grandmother should have been suppressed on the grounds of involuntariness. We do not agree. The record in this case reveals defendant was an intelligent and educated young woman. The police sought to adhere to a statutory provision regarding the consent of a guardian and allowed defendant to speak to her grandmother so the grandmother could assess the situation and decide whether to grant her consent. No evidence of coercive police activity exists and a review of the totality of the circumstances leads us to the conclusion defendant's statements to her grandmother were the product of an essentially-free and unconstrained choice made by her at a time when her will was not overborne nor her capacity for self-determination critically impaired. Admission of statements defendant made to her grandmother was not in violation of her fifth-amendment rights.

Defendant contends admission of her statements was in violation of our juvenile code. Our juvenile code implements and goes beyond the constitutional right to

counsel provided for juveniles by explaining the stages of proceedings when a child may be represented and the effect of denial of the right to counsel on statements offered in evidence. State v. Nelson, 435 N.W.2d 344, 346 (Iowa 1989).

A statement obtained from a juvenile without a valid waiver of counsel under section 232.11(2) is per se inadmissible in evidence in district court proceedings by operation of Iowa Code section 232.45(9). Id. at 347. The State contends the per se exclusion rule applies to statements which were the product of "custodial interrogation" similar to the analysis used in a Miranda inquiry. Likewise, the State argues where other statements are not the product of custodial interrogation, they should be admissible. The juvenile code appears to support application of a dual analysis to uncounseled statements made by a juvenile. "Other statements made by a child are admissible as evidence in chief provided that the court finds the statements were voluntary." Iowa Code § 232.45(9) (1987).

We have already determined defendant's statements to her grandmother were neither involuntary or the result of custodial interrogation. Under these circumstances, no violation of the juvenile code occurred in declining to suppress admission of these statements.

IV. Prosecutorial Misconduct. Finally, defendant contends she was denied a fair trial due to numerous

instances of prosecutorial misconduct. She complains the prosecutor unlawfully interfered with her pretrial discovery by instructing State witnesses not to talk to the defense. She contends the prosecutor insinuated during closing argument that her attorney had coached her to cry on the witness stand. She also contends that during the trial the prosecutor pursued subject matter which the court had previously ordered suppressed.

To prevail on a claim that a defendant has been denied a fair trial by prosecutorial misconduct, a defendant must show the misconduct and that the defendant was prejudiced by it. State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985). Trial courts are vested with broad authority to determine whether prejudice has resulted from an act of prosecutorial misconduct. Id. Discretion is accorded to the trial court in this area because of its proximity to the conduct; it is in a better position than an appellate court to make a determination in accordance with the demands of justice. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982). We do not overturn trial court rulings in the absence of a showing of abuse of discretion. Ruble, 372 N.W.2d at 218. An "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." Id.

Defendant claims her defense preparation efforts were hampered by the prosecution's instruction to Dr. Turner not

to talk to defense attorneys without the presence of one of the prosecutors. The record reveals the prosecutor did not instruct the doctor not to talk to the defense attorneys unless she was present, but instead expressed a preference that he not do so in her absence.

Upon defendant's request for unobstructed access to the witnesses, the court granted defendant such access free from the presence of the prosecution. The court instructed defendant to raise any further difficulties encountered in interviewing witnesses and it promised to remedy any such situations as they arose.

Subsequent to defendant's request, the record reveals no surprise or inaccessibility with regard to witnesses. We cannot find the prosecutorial conduct in this matter prejudiced defendant or denied her a fair trial.

As a second example of prosecutorial misconduct, defendant claims she was prejudiced by the prosecution's reference to the tears she shed while testifying. The prosecutor's statement regarding the emotional display was made in the closing argument. Defendant claims the prosecutor insinuated she was "coached" by her counsel to cry before the jury.

A prosecutor is entitled to sum up the evidence and is permitted some latitude in analyzing the evidence. State v. Mulder, 313 N.W.2d 885, 892 (Iowa 1981), cert. denied, 459 U.S. 841 (1982). A prosecutor is entitled to draw inferences reasonably flowing from the evidence adduced at trial. State v. Hoffer, 383 N.W.2d 543, 550 (Iowa 1986).

A defendant who offers herself as a witness subjects herself to the same rules of impeachment and credibility as other witnesses. State v. Broten, 176 N.W.2d 827, 829 (Iowa 1970). A witness's behavior while testifying is itself evidence. See State v. Castillo, 315 N.W.2d 63, 66 (Iowa 1982). Thus, a defendant's "display of emotion . . . on the witness stand is a part of her demeanor which is subject to consideration by a jury in determining the credibility of her testimony." State v. Plowman, 386 N.W.2d 546, 551 (Iowa App. 1986).

The record reveals a factual background as to defendant's display of emotion, and the inference drawn by the prosecution is not based upon knowledge of facts not possessed by the jury. The principles governing a prosecutor's closing remarks do not preclude all personalized remarks; it merely precludes those that do not appear to be based on the evidence. State v. Williams, 334 N.W.2d 742, 745 (Iowa 1983). The prosecutor's comments did not constitute misconduct, and even if they did, defendant demonstrated no prejudice from the remarks.

Finally, defendant claims the prosecutor on several occasions deliberately asked questions which were designed to elicit information which had previously been suppressed. She specifically challenges questions posed to Agent Fees, the Younkers store clerk, and herself.

Generally, there can be no reversal on the sole ground of questions asked unless the bad faith of the prosecutor

is shown. State v. Gilroy, 313 N.W.2d 513, 519 (Iowa 1981). It is without question the prosecution should not attempt to elicit through questioning any evidence previously suppressed by the court. However, our review of this case reveals no bad faith on the part of the prosecution in this matter. The answer of Agent Fees was not anticipated by the prosecutor and its innocuous nature rendered it without prejudice to defendant. Similarly, no bad faith or prejudice accompanied the question posed by the prosecution to the store clerk, and in any case, the clerk's answer in this matter would have been merely cumulative to evidence already in the record.

During direct examination, defendant admitted knowing that using the credit cards would bring the police to her. When asked why, if she knew using the cards would bring the police to her, she just did not go to the police, defendant responded, "I was too afraid to. I wanted to do something to get it over with, but I just couldn't go there and tell them what had happened."

Upon cross-examination, defendant was asked that if she knew using the credit cards would bring the police, did she have some kind of plan as to what she was going to do once they got there. Defendant responded, "Get arrested." She was then asked, "Did you have some kind of plan as to what you were going to tell them?" An objection was lodged and sustained, and the jury was admonished to disregard the question.

The question was intended to impeach the implicit explanation defendant had offered for using the credit cards. Defendant had indicated her use of the cards was to attract the police and end the ordeal. The prosecutor's question was not what defendant had told the police at the mall, but what she had planned to tell them once her conduct had gained their attention.

Recognizing the prosecution's question could easily delve into an area of evidence previously suppressed (what defendant actually told the officers at the mall), the trial court sustained the objection. However, we are unable to conclude the question was posed in bad faith or that it prejudiced defendant.

The trial court did not abuse its discretion in declining to find defendant was prejudiced by prosecutorial misconduct. Defendant's conviction is affirmed.

AFFIRMED.