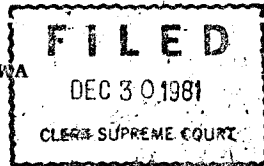


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 30, 1981

vs.

)

DALE E. GANSZ,

)

$$\frac{1-232}{65275}$$

Defendant-Appellant.

)

Appeal from Scott District Court, Lowell Phelps, Judge.

Defendant appeals his conviction of second-degree murder in violation of sections 707.1 and 707.3, The Code 1979. AFFIRMED.

Patrick R. Grady, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General, and Julie Pottorff, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction of second-degree murder in violation of sections 707.1 and 707.3, The Code 1979. We affirm.

On December 13, 1978, the defendant, Dale E. Ganz, was charged by trial information with two counts of murder in the first degree in violation of section 707.2, The Code 1979. The shooting apparently resulted from a marital dispute involving the defendant, his wife, Robin Tutor, and Ralph Zaug, one of the fatally wounded individuals who had been seeing Ms. Tutor.

The record indicates the defendant and two of his friends, Donald Krackliow and Kevin Haskins, formulated a plan to "rough up" Zaug at his apartment in Davenport. Krackliow was to lure Zaug from his apartment with a fabricated story that his car had been hit in the parking lot. When Zaug would step out, defendant would proceed to "rough him up."

The plans went awry when defendant took his .22 caliber rifle to Zaug's apartment. When Krackliow knocked on the door and Zaug answered, defendant stepped in front of Krackliow and confronted Zaug. Zaug grabbed the barrel of the gun and began wrestling with the defendant. By the time the scuffle ended, both Zaug and his roommate, Steven Fullam, lay fatally wounded.

On appeal, defendant claims the trial court erred in failing to properly instruct the jury on the element of malice aforethought as required for conviction of second-degree murder, admitting testimony not contained in the minutes of testimony and in admitting rebuttal testimony to impeach the defendant on a collateral issue.

I. Defendant asserts the trial court committed reversible error by failing to properly instruct the jury on malice aforethought, a necessary element of second-degree murder. The defendant has two theories upon which he relies.

A. Defendant maintains Instruction 16 is defective due to the omission of language instructing the jury on the permissibility of inferring malice aforethought from the use of a deadly weapon only "in the absence of evidence to the contrary." The relevant portion of Instruction 16 provides: "The Law provides that when a person intentionally uses a dangerous weapon against another and death results, you may, but are not required to, infer that the killing was with malice aforethought." We disagree with the defendant's claim Instruction 16 was defective.

At the outset, we note Instruction 16 is a verbatim reiteration of Iowa Uniform Jury Instruction 704. As stated by the court in State v. Whiteside, 272 N.W.2d 468 (Iowa 1978), courts are reluctant to find the trial court erred in giving an instruction that parallels a uniform instruction. Id. at 471.

We see no merit in the defendant's contention Instruction 16 failed to apprise the jury that the inference of malice aforethought could be overcome. Instruction 16 clearly creates a permissive inference, which the jury is at liberty to reject. See State v. DeChant, No. 64856, slip op. at 3 (Iowa October 21, 1981). No reasonable interpretation of Instruction 16 would support an argument that Instruction 16 created a forbidden mandatory presumption. See State v. Rinehart, 283 N.W.2d 319, 320-21, (Iowa 1979), cert. denied. 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775; accord State v. Pierce, 287 N.W.2d 570, 575 (1980).

B. Defendant also argues Instruction 16 improperly defined malice in that it allowed the jury to find malice merely on proof of spite, hatred or ill will. The relevant part of Instruction 16 is as follows:

Malice as used in these instructions means a state of mind which leads one to intentionally do a wrongful act to the injury of another, which is done out of actual spite, hatred, illwill, or with an evil, wicked or unlawful purpose, knowing that the act is without just cause or excuse. Malice may be either express or implied.

Again we note the quoted portion of Instruction 16 follows the language of the Uniform Jury Instruction 216, and for that reason we are less inclined to find the instruction was defective. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).

We are of the opinion Instruction 16 properly defines malice. We do not interpret the instruction as permitting the jury to find malice solely on the basis of spite, hatred or ill will. In State v. Rutledge, 243 Iowa 179, 193, 47 N.W.2d 251, 260 (Iowa 1951), the court approved the following instruction: "Malice means that condition of the mind which prompts one to do a wrongful act intentionally, without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but does signify that state of disposition which shows a heart that is regardless of human life." In State v. Leedom, 247 Iowa 911, 916-17, 76 N.W.2d 773, 776-77 (Iowa 1956), the court held mere spite, hatred or ill will does not constitute malice. Instruction 16 informs the jury malice is a state of mind motivating the wrongful act. We find no error in Instruction 16.

II. Defendant also asserts as prejudicial error the trial court's admission of testimony not included in the minutes of testimony. The State admits the minutes of testimony did not contain the specific testimony to which the defendant has objected. However, the record is replete with evidence the defendant was fully apprised of the substance of the proffered testimony. The defendant cannot claim prejudice from the inconsistency between the actual testimony and the minutes of testimony, nor should the State be required to precisely follow the minutes. State v. Glenn, 234 N.W.2d 396, 401 (Iowa 1975); State v. Bell, 223 N.W.2d 181, 183 (Iowa 1974). There was no reversible error here. See State v. Waterbury, 307 N.W.2d 45, 50-51 (Iowa 1981); cf. State v. Walker, 281 N.W.2d 612, 614-15 (Iowa 1979).

III. Finally, defendant claims the trial court committed reversible error in admitting rebuttal testimony to impeach the defendant on a collateral issue.

In State v. Fowler, 248 N.W.2d 511 (Iowa 1976), the court stated:

It is well settled the veracity of a witness may be generally placed in question by presentation of evidence revealing material facts are other than as stated by the testifying party. See State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974).

Even so, the above precept is circumscribed by this pronouncement in State v. Hill, 243 N.W.2d 567, 571 (Iowa 1976):

"It is well settled, however, the right to impeach by prior inconsistent statements is not without limit. The subject of the inconsistent statement, if it is to be admissible, must be material and not collateral to the facts of the case."

Id. at 520. The court then offered the following as a test to determine if a matter was collateral: "[the matter is collateral if] the fact as to which error is predicated could not, over appropriate objection, have been shown in evidence for any purpose independent of the contradiction." Id. We review the trial court's ruling to see if there was abuse of discretion. State v. Webb, 309 N.W.2d 404 (Iowa 1981). We are of the opinion the trial court did not abuse its discretion in admitting rebuttal testimony of Delores Plager.

At trial the defendant testified he had received threatening phone calls from either his wife, Robin Tutor, or her mother, Delores Plager. Apparently, the purpose of that testimony was to establish the fact defendant did not intend to harm anyone at Zaug's apartment. The defendant maintains he merely intended to scare Zaug in order to coerce Zaug so he would use his influence to make Tutor and Plager stop harassing

him. Thus, whether the defendant was harassing Tutor and Plager, or vice verse, was a material fact in the defendant's case that could have been shown in evidence for a purpose independent of contradiction. Consequently, admitting the rebuttal testimony of Delores Plager was permissible impeachment of the defendant's veracity on a noncollateral issue. There was no abuse of discretion.

AFFIRMED.