

IN THE COURT OF APPEALS OF IOWA

No. 2-272 / 91-386

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM THORNTON,

Defendant-Appellant.

Appeal from the Iowa District Court for Webster County,
Mark S. Cady, Judge.

Thornton appeals from his conviction, following a jury trial, of second-degree murder. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, James J. Koll, County Attorney, and James E. Fitzgerald, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant William Thornton appeals following his conviction for murder in the second degree. The defendant contends (1) there was insufficient evidence to support his conviction, and (2) he was denied a fair trial. We affirm in part; reverse in part; and remand for a new trial.

Defendant was convicted in the death of Samuel Colvin. Colvin was tending bar when defendant reminded Colvin he owed defendant money. Defendant contends Colvin came at him with a knife and defendant took a gun out of the waistband of his trousers and shot Colvin. Colvin was six feet two inches tall and weighed about 280 pounds and was in good health. Defendant was a big man but not in such good health. Defendant testified he had no retreat. A knife was found near Colvin's body. Defendant was the only living witness to the confrontation between the two men.

Defendant testified in his own behalf and said he shot Colvin only after Colvin grabbed a knife and lunged at him. Defendant said the incident happened very quickly and he did not recall the details or the manner in which the event occurred. During cross-examination defendant was asked repeatedly by the State to stand before the jury and reenact his actions and the actions of decedent. Defendant repeatedly said he could not accurately demonstrate the incident because it happened too quickly for him to recall

the detail and he was nervous and scared. Defendant had a physical disability that limited the movement of his left arm and leg.

I.

Defendant first claims the State failed to introduce evidence that proved beyond a reasonable doubt he had not acted with justification. Defendant raised a justification defense in filing a "Notice of Self-Defense." See Iowa Code §§ 704.1, 704.3 (1989). When a defendant raises a justification defense, the State has to prove beyond a reasonable doubt that the defendant did not act with justification. See State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979). To overcome the defense and convict the defendant, the State must prove any of the following elements beyond a reasonable doubt:

1. That the defendant started or continued the incident resulting in Colvin's death.
2. That an alternative course of action was available to the defendant.
3. That the defendant did not believe he was in imminent danger of death or injury and that the use of force was not necessary to save himself.
4. That defendant did not have reasonable grounds for any belief he may have had.
5. The force used by the defendant was unreasonable.

See Mayes, 286 N.W.2d at 392-93.

Defendant filed a motion for a judgment of acquittal, thereby preserving error. In addressing this issue, we review the evidence in the light most favorable to the State. See State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988). We consider any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. See State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence and not just the evidence which supports the verdict. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Direct and circumstantial evidence are equally probative, as long as the evidence raises a fair inference of guilt and does more than create suspicion, speculation, or conjecture. See State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Defendant introduced evidence that Colvin pulled a knife and lunged at him, and that he was in fear for his life and had no reasonable means of escape. Defendant testified he pulled out his gun and shot Colvin in self-defense.

The jury was not required to believe defendant's version of the events given the other evidence in the case. See Blair, 347 N.W.2d at 420. Defendant visited the bar twice. On the first visit, defendant asked Colvin for money Colvin owed defendant. Colvin said he did not owe defendant money and would not pay him. When defendant visited the bar two hours later, defendant had a loaded

pistol tucked in the waistband of his trousers. The gun was concealed by defendant's shirt. Defendant again asked Colvin for the money and Colvin refused to pay defendant. Defendant then shot Colvin. The jury could have inferred from this evidence that defendant returned to the bar with the intention of using the gun to collect his money. If these were the facts, the shooting was not justified. We affirm on this issue.

II.

Defendant next contends he was denied a fair trial because of the State's continuous demand for a demonstration of the shooting after defendant had testified he could not demonstrate the incident. Defendant contends the State's continuous demands for a demonstration prejudiced him because it harassed and humiliated him before the jury. Defendant also contends he was denied a fair trial because the county attorney made improper statements to the jury in closing argument.

During the State's cross-examination of defendant, the following occurred:

The State's attorney:

I would ask the court to instruct the witness to stand up. I would like to do a demonstration for the jury at this time, using Mr. Thornton and myself. He can describe to this jury and show the jury exactly what happened.

* * *

The witness: Your Honor, I don't think I can do this.

The court: Is it your health, sir?

* * *

By State's attorney:

Q. Mr. Thornton, isn't it true just before this break you turned to this judge and told him that you did not want to try to show this jury how it happened? A. Yes.

Q. The reason why you don't want to show him how it happened is because it's physically impossible for this shooting to have occurred how you described it. You could not have pulled this gun out and killed Sam Colvin after he had lunged at you with the knife. Isn't that true? A. Mr. Coleman, the only thing I can tell you and be accurate with it is the truth. The truth is it happened in a split second and I cannot perform the incident the way it happened.

Q. Are you willing to try to let this jury see?
A. It will not be accurate because I cannot do it.

Q. Are you willing to try? A. I will do what I can, but I don't think I can give you what you are looking for.

* * *

Q. Well, why don't you come down here and we will see what we can do for the jury to give them as accurate a representation or reenactment of what happened between you and Mr. Colvin. Are you willing to try to do it? A. I cannot do it.

Q. Are you refusing to show the jury what happened? A. I am just saying I can't do it.

Q. Are you willing to try? A. It ain't going to be accurate. I will do what I can do.

Q. You come down and show this jury.

Defendant's attorney objected in light of the fact defendant said it would not be accurate. The objection was overruled. The State's attorney continued as follows:

Q. Mr. Thornton, why don't you stand where you are at and I will stand. First of all, was this bar that you have described to the jury, was that between you and Mr. Colvin at the time of the shooting or were you at the end of the bar away from it? A. At the end of the bar.

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Q. There is nothing between you and Mr. Colvin at the time? A. Like this. We was at the end of the bar this way, I think.

Q. Okay. Mr. Colvin would be on the inside of the bar area and you were on the outside? A. Yeah.

Q. Were you standing about in the same position as you are now in relationship to the bar as you are in relationship to the witness counter? A. Just about. Somewhere in there.

Q. You tell me how close to get to you in terms of where Sam Colvin is. A. That's what I am telling you now. I can't tell you.

Q. Am I approximately the same distance? A. I can't tell you that.

Q. You don't remember? A. That's what I am telling you.

Q. Okay. A. I am being fair. You are asking me a question and I am giving you the best of my ability.

Q. I am trying to give you the opportunity to show the jury. A. I can't tell you. I am trying to tell you.

Q. At this point in time you tell me you saw a knife. You are saying you saw a knife in Sam Colvin's hand; is that correct? A. Yes.

Q. Which hand was it in? A. The right, I believe. I believe it was in the right. I just seen the knife.

Q. Do you recall Lilly Miller testifying that the hand was below the level of the bar at the time he was shot? A. I believe she said she couldn't see his hand.

Q. It was because it was below the level of the bar. Isn't that true? A. I don't know. I can't say. The only thing I am telling you is I looked down and seen the knife and I shot him.

Q. You tell this jury where Sam Colvin's hand was when you shot him -- the hand with this alleged knife in it. A. I said I looked down.

Q. Was the hand down? A. I don't know how it were. I am telling you now that I cannot do what you are asking me to do. You are asking me to perform the impossible.

Q. I am not asking you to perform anything. Just describe to this jury at this point was his hand down or up? A. Ladies and gentlemen of the jury --

State's attorney: I object.

The witness: I will do the best I can do.

The court: Mr. Thornton.

State's attorney: Objection, your Honor. He is making speeches.

Defendant's attorney: He is objecting to it and won't give him a chance to answer. The county attorney can't keep cutting him off. He was going to explain to the jury to the best of his ability and the county attorney cuts him off when he doesn't like the answer. I ask the county attorney to back away from the witness.

State's attorney: I am four or five feet away from him.

The court: Could you be seated, Mr. Thornton? Mr. Koll, you may continue your examination.

Q. We will leave it at this. Are you telling this jury that you are unable to show them what happened between you and Sam Colvin? A. What I am doing, Mr. Koll, is telling you the truth. It happened in a split second and I can't tell you nothing else beyond that.

* * *

Q. Can you show with your own arm, show where Sam Colvin had this knife when you shot him. A. Mr. Koll, I am going to go again. I believe I said it happened in a split second. I cannot perform what you are asking me to do.

* * *

Q. Did he have a knife out at that point. A. Mr. Coleman, do I go again? It happened in a split second. I seen the knife. I didn't have time to do nothing.

* * *

Q. So you want to show this jury right now how fast you can lift your shirt up, reach down, pull an imaginary gun out of your belt, pull it up, get it in somebody's chest? Do you want to show them how fast it would take you? A. I said I didn't have time to aim.

Q. What did you do as soon as you had shot him?
A. I was scared. I turned and walked out.

Q. Okay. Do you think you could reenact that for the jury? If you can't reenact for them what happened between you and Mr. Colvin, could you show the jury -- hold up your hand and show the jury after you fired the shot what you did with your hands and how you retreated from this area.
A. (Pause) Mr. Koll, I don't know how I did or which way I did. I was scared. I am scared.

* * *

Q. Mr. Thornton, would you now like to stand up and show this jury what happened between you and Sam Colvin?

Defendant's attorney: Objection. This question has been asked and answered.

The court: Sustained.

Defendant contends the State's constant demands for the demonstration were improper because there was not foundation for defendant to conduct the requested demonstration. Defendant further contends he was prejudiced by the repeated demands and his trial counsel was not effective in failing to object to the prejudice of the repeated demands.

On cross-examination the examiner has a reasonable latitude to inquire in proper areas so as not to exclude matters relevant to the issues being tried. See State v. Daws, 269 N.W.2d 434, 438 (Iowa 1978). But a court also has a duty to protect witnesses from questions that go

beyond the bounds of proper cross-examination and appear to be asked for the purpose of harassing, annoying or humiliating a witness. See Smith v. Illinois, 390 U.S. 129, 133, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956, 959-60 (1968); Alford v. United States, 282 U.S. 687, 692-94, 51 S. Ct. 218, 219-20, 75 L. Ed. 624, 627-29 (1931).

Defendant does not challenge the State's right to ask for a demonstration, rather, defendant challenges the repeated requests when defendant said he could not perform a demonstration. Defendant appeared as a witness in his own behalf and testified to his version of the facts of the shooting. There is no self-incrimination challenge.

Defendant clearly lacked the foundation to demonstrate the events. His testimony was he did not have sufficient memory to do so. Defendant repeatedly said he did not have the ability to demonstrate. It is reasonable for a participant not to have a memory of specific actions and distances in a confrontation. The State had the right to argue defendant's testimony was not credible because he could not remember or could not demonstrate, but the State does not have the right to badger defendant on the witness stand where he or she claims a lack of memory.

A trial judge has a duty to control and conduct the court over which he or she presides in an orderly, dignified and proper manner. See State v. Huston, 439 N.W.2d 173, 177 (Iowa 1989); State v. Cuevas, 288 N.W.2d

525, 531 (Iowa 1980) (trial court acted within its discretion in intervening in an intense exchange between a questioner and a witness where the witness was being asked a series of repetitious questions and he repeatedly responded he was not able to answer); Schroedl v. McTague, 169 N.W.2d 860, 867 (Iowa 1969). The court may exercise a reasonable judgment in determining when the subject is exhausted. Alford, 282 U.S. at 694, 51 S. Ct. at 220, 75 L. Ed. at 629.

The trial court should have sustained defendant's objections to the repetitive attempts to have defendant perform a demonstration that defendant repeatedly said he could not perform. Defendant was prejudiced by the exchange which, when the trial judge failed to sustain the objections, put defendant in a bad light in the jury's eyes. The decision on this issue requires us to reverse and remand for a new trial.

We next address defendant's challenge to remarks made by the county attorney in rebuttal argument. The State's theory was that defendant shot Colvin for refusal to pay the debt and that Colvin did not have a knife at the time of the incident. The State explained the knife next to Colvin's body as having fallen from the bar when the bar was removed to render medical aid to Colvin.

In its rebuttal argument, the State asserted for the first time that defendant initially placed a gun to

Colvin's chest and then Colvin reached for the knife to protect himself from defendant. The defense counsel objected to the argument on the grounds that there was no evidence to support this theory and the trial court overruled the objection and admonished the jury to draw its own conclusions from the evidence.

Defendant contends these arguments are not proper and to assert the theory in rebuttal was not proper when there was no direct evidence to support the theory.

Counsel is entitled to some latitude in analyzing the evidence. He or she may draw conclusions and argue all the inferences that may reasonably flow from the evidence as long as he or she does not misstate the fact. See State v. Odem, 322 N.W.2d 43, 47 (Iowa 1982). The State's and defendant's arguments were premised on circumstantial evidence. The fact the State's suggestion was inconsistent with defendant's testimony does not mean the State misstated the record. See State v. Van Hoff, 371 N.W.2d 180, 186 (Iowa App. 1985) (a theory asserted during closing arguments need not be consistent with all of the evidence in the record).

Defendant's closing argument emphasized the evidence supporting his claim Colvin had a knife in his hand when he shot him. Defendant posed a new theory that Colvin picked up a knife as soon as Colvin saw defendant come into the room.

This argument opened the door. The State was not required to let defendant's interpretation of the evidence go unchallenged. See State v. Hall, 235 N.W.2d 702, 728 (Iowa 1975). The State was entitled to make a fair response. See Brewer v. State, 444 N.W.2d 77, 84 (Iowa 1989). The State was entitled to additional leeway in rebuttal because defendant's new argument was partially responsible for the State's response. See Wycoff v. State, 382 N.W.2d 462, 468 (Iowa 1986); State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR NEW TRIAL.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J., (dissenting)

I respectfully dissent to the majority's reversal of defendant's conviction of second-degree murder. The trial court did not abuse its discretion in allowing the prosecutor's repeated questioning of defendant during cross-examination. Therefore, I do not find defendant was denied a fair trial.

In the review of the district court's decision whether to intervene in the exchange between the prosecutor and defendant, we review for an abuse of discretion. State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

The trial court may exercise its reasonable judgment in determining when a subject is exhausted. Alford v. United States, 282 U.S. 687, 694, 51 S. Ct. 218, 220, 75 L. Ed. 624, 629 (1931). Even though defendant repeatedly testified he did not have the ability to demonstrate the events, I agree the State had the right to argue defendant's testimony was not credible because defendant could not remember and could not demonstrate the events about which he had just testified.

Our standard of review is not to substitute our judgment and review the evidence as if we were sitting as the trial judge. Rather, our review is to determine whether the trial court abused its discretion in not sustaining defendant's objections and permitting the prosecutor's repeated questioning of defendant regarding whether defendant could demonstrate the events. I find the trial judge certainly did not abuse his discretion in this regard.

I would affirm the trial court.