

IN THE COURT OF APPEALS OF IOWA

No. 7-475 / 96-1910

000403

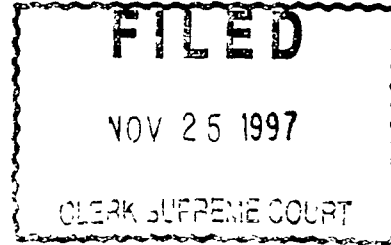
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JERRI LYNN PEARSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Jerri Lynn Pearson appeals her conviction and sentence, following a jury trial,
for attempted murder in violation of Iowa Code section 707.11 (1995). **AFFIRMED.**

W. Patrick Wegman of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County
Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Huitink, JJ.

PER CURIAM.

Defendant-appellant Jerri Lynn Pearson appeals her conviction for attempted murder for shooting Dennis Thompson in the early morning hours of August 26, 1995. Defendant claimed to have acted in self-defense in the shooting. The facts at trial came primarily from the conflicting testimony of defendant and Thompson.

Defendant first contends there was not sufficient evidence to convict her of attempted murder in violation of Iowa Code section 707.1.

We review the evidence in the light most favorable to the State, and we consider all the evidence and such inferences as may reasonably be drawn from it. *State v. Craney*, 347 N.W.2d 668, 680 (Iowa 1984); *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981); *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). "Substantial" evidence is such evidence as could convince a rational trier of fact beyond a reasonable doubt. *Robinson*, 288 N.W.2d at 339.

Defendant contends the only evidence she acted without justification is the testimony of Thompson, which she claims is not credible. Thompson's testimony, if believed, is sufficient to support the charge. Defendant contends, however, there are so many inconsistencies in Thompson's testimony it cannot be believed and she should have a judgment of acquittal. We have reviewed the inconsistencies specified by the defendant and do not find they support a judgment of acquittal. We affirm on this issue.

Defendant next contends the district court erred in allowing the State to cross-examine her with inconsistent statements made to a psychiatrist.

Defendant originally asked for a psychiatric evaluation at State expense for purposes of a possible defense of insanity or diminished capacity. The application was granted and defendant was interviewed by Ray Moore, Ph.D. Moore provided a written report. Defendant filed a notice she intended to raise an insanity defense and the court ordered she be examined by a psychiatrist for the State. The record does not reveal that examination took place. Defendant withdrew the insanity defense.

The trial court allowed the State to cross-examine defendant on statements she made to Moore, but directed Moore not be referred to as a doctor in the cross-examination. The reason the trial court gave for the decision not to allow any reference to "doctor" was that then the jury would not necessarily know about the proposed insanity defense or its withdrawal.

In *State v. Tryon*, 431 N.W.2d 11, 16-17 (Iowa App. 1988), the court found use of a psychiatrist as a rebuttal witness after defendant had testified did not violate defendant's due process rights or defendant's right against self-incrimination because the evidence was not presented as a part of the State's case to establish defendant's guilt. See *Craney*, 347 N.W.2d at 674.

This case differs from *Tryon* in that the evidence came on cross-examination, not rebuttal. But, in both cases the evidence was used for impeachment purposes. We affirm on this issue.

Defendant next contends the report was protected by the attorney-client privilege. The State contends this error was not preserved for review. We agree but note the court in *Craney* rejected what they called a "constitutionalized attorney-client privilege for a defendant's communications to a mental expert." *Craney*, 347 N.W.2d at 677. Even if considered, this challenge is without merit.

Defendant contends it was prosecutorial misconduct for the State to use "doctor" in reference to Moore. The reference came when the State asked defendant about Moore's report and said, "You told the doctor -- oh, excuse me." Defendant subsequently made a motion for mistrial. The trial court denied the motion finding it questionable whether the jury noticed the slip and there was no prejudice. The trial court has broad authority to determine if prejudice results from alleged misconduct. *See State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985). The trial court did not abuse its discretion in not ordering a mistrial.

Defendant next contends the State should not have been able to question her regarding her post-arrest silence. Defendant testified after the shooting she headed for St. Charles, Iowa. Defendant objects to the following questions concerning her behavior after Dennis Thompson was shot:

Q. Did you talk to the police before you started towards St. Charles? A. No.

Q. But you knew Dennis had been hurt and you knew he had been shot? A. And I tried to get him in the car and tried to get him to the hospital.

Q. But on the way to St. Charles you did not call the police and tell them what had occurred? A. No. We stopped by [Jay Ruggle's] house and I thought about it, but he said the guy that broke in ripped out the phone lines, remember, so . . .

Q. And you couldn't go to the police station and you couldn't stop at a pay phone? A. I was planning on getting Jay out of the situation and going straight to where it happened and talking to the police about it.

Q. But you went down to St. Charles or went towards St. Charles and the gun was thrown into a stream or river of some type, is that correct? A. Jay did that, yes.

Q. And then you started back towards Des Moines, is that correct? A. Yes.

Q. And you never did make it to Jay's dad's home in St. Charles? A. He wouldn't go.

Q. And then you were placed under arrest, is that correct? A. I was three blocks away from where it happened when I was placed under arrest, yes.

Q. Did you ever explain this to the police? [objection overruled]
A. The night when I was being arrested, I tried to talk to somebody and he kept telling me to shut up, I could talk to somebody later, and nobody ever questioned me after that.

Q. Nobody ever asked you any questions about this incident? A. No, sir, they did not.

On redirect, the topic was once again addressed:

Q. [BY DEFENSE COUNSEL] And you've -- this testimony the last -- well, half day now, you've talked to several people regarding this story, haven't you? A. Yes.

Q. And the version of events? A. Yes.

Q. Has your version of the events changed in any of those conversations? A. No.

Q. You said the police never asked you any questions, is that right? A. No, they did not.

Q. You tried to volunteer but they wouldn't listen to you? A. They wouldn't.

Defendant on direct examination testified she did not drop Ruggle off at St.

Charles because he told her she needed someone to tell the police Thompson was

choking her. The examination focused not on pre-arrest silence but on her attempt to voluntarily tell what had happened. We find no error here. *See State v. Bass*, 349 N.W.2d 498, 503 (Iowa 1984) (where defendant voluntarily engages in conversation about events surrounding a crime, the concern for preserving constitutional protections is no longer present).

Defendant contends it was error for the trial court to submit a jury instruction on aiding and abetting because there was not substantial evidence to support a finding of aiding and abetting. There was evidence of both defendant's and Jay Ruggle's involvement in the crime. It was not error to give the instruction.

Defendant contends Thompson should have been cross-examined on his prior record. We disagree. *See State v. Zaehring*, 325 N.W.2d 754, 756-57 (Iowa 1982).

We have considered defendant's other claims and find them to be without merit.

AFFIRMED.