Cite as 2012 Ark. 398

SUPREME COURT OF ARKANSAS

No. CR-12-7

RICHARD T. GORDON, SR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** October 25, 2012 APPEAL FROM THE STONE COUNTY CIRCUIT COURT [NO. CR-11-24] HONORABLE TIM WEAVER, JUDGE AFFIRMED.

JIM HANNAH, Chief Justice

Richard T. Gordon was convicted of first-degree murder and sentenced to a term of life imprisonment plus fifteen years.[1] On appeal, Gordon argues that the circuit court abused its discretion (1) in admitting evidence of a jailhouse fight in the State's rebuttal case and (2) in limiting the testimony of an expert witness. We affirm. Jurisdiction lies in this court because a life sentence was imposed. *See* Ark. Sup. Ct. R. 1-2(a)(2) (2012).

Gordon was first tried in Fulton County Circuit Court on September 21, 2010, and the jury deadlocked. A mistrial was declared, and on October 13, 2010, the circuit court found that "the minds of the inhabitants of Fulton County are so prejudiced against the defendant that a fair and impartial trial cannot be had in Fulton County." Venue was changed to Stone County. Gordon was tried in Stone County Circuit Court, and this appeal followed.

[1]Gordon's sentence was enhanced by fifteen years pursuant to Arkansas Code Annotated section 16-90-120 (Supp. 2009) (commission of a felony with a firearm).

Gordon admitted that he shot and killed Joe Clifton on September 3, 2009. At the time of the shooting, Gordon was standing near Clifton's truck and had a .45-caliber semiautomatic pistol at his side. Clifton was sitting in the cab of his truck and had a .270-caliber rifle in the truck with him. Gordon asserted the defense of justification, arguing that he shot Clifton in self-defense when Clifton "brought the rifle up." According to Gordon, there was no opportunity for retreat, and he was compelled to defend himself by shooting Clifton. Clifton was hit by three .45-caliber bullets and died almost immediately. He was found slumped over the steering wheel.

Gordon's wife testified that Gordon came home and told her that he had killed Clifton "graveyard dead."[2] She admitted that she told law enforcement that Gordon stated to her that Clifton had begged him not to shoot. Testimony of the first witnesses on the scene of the shooting revealed that Clifton's rifle was lodged between the seat and the center console of the truck where Clifton always kept his rifle.[3] A witness who later arrived at the scene testified that the rifle was in the seat.

Gordon testified at trial in the defense case, and in cross-examining him, the State raised the issue of a jailhouse fight and a videotape that supposedly showed that Gordon started the fight. The State cross-examined Gordon as follows:

PROSECUTOR: Okay. And in fact, you've been in a fight since you've been at the jail?

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[2]Gordon's wife was unavailable for the Stone County trial. Her testimony from the earlier Fulton County trial was read to the jury.

[3]There was a conflict in the testimony of the witnesses who testified that the rifle was lodged between the seat and the console as to where it was in relation to the console.

GORDON: Yes, ma'am.

. . . .

PROSECUTOR: And if we have a videotape of that fight it won't show that you started the fight?

GORDON: No, ma'am. What the video shows is after that.

PROSECUTOR: I'm sorry?

GORDON: What the video shows is what took place after the fight was started. Were you there?

In its rebuttal case, the State called Charlie Hill, administrator of the Izard County jail, to testify regarding the fight and to introduce a videotape, both intended to impeach Gordon's assertion on cross-examination that he did not start the fight. Gordon asserts that the circuit court erred in admitting the videotape and the testimony in the State's rebuttal case.

Evidence that may be presented by the State in its rebuttal case consists of evidence offered in reply to new matters presented by the defense. *See Gilliland v. State*, 2010 Ark. 135, at 11, 361 S.W.3d 279, 285; *Pyle v. State*, 314 Ark. 165, 178–79, 862 S.W.2d 823, 830 (1993). Here, the State, rather than the defense, presented the new matter of the jailhouse fight and videotape. The State may not ask questions of a defendant during cross-examination that are "designed to manufacture a rebuttal situation for a presentation of the State's evidence that belonged in its case in chief." *Birchett v. State*, 289 Ark. 16, 19, 708 S.W.2d 625, 627 (1986). This is because, as in this case, the subsequent attempt to impeach in the State's rebuttal case is not undertaken in rebuttal of anything the defendant presented in his or her defense. *See id.* at 20, 708 S.W.2d at 627.

However, the State argues that, even if the circuit court erred, the issue is not preserved for review on appeal. When Hill was asked by the State about the videotape, defense counsel asked to approach the bench and the following bench conference took place:

DEFENSE COUNSEL:	Now, I don't understand why this rebuttal is to show - - why wasn't this presented on direct?
PROSECUTOR:	It's rebuttal because it comes in because he's testified that he's a saint.
DEFENSE COUNSEL:	No. He never testified that he was a saint.
PROSECUTOR:	Well, that he loves people or loves his neighbors. You know he gets along with people.
THE COURT:	On his testimony he wasn't the aggressor on this. He testified he was not the aggressor.
PROSECUTOR:	No. He's going to say he's not the aggressor in this deal.
SECOND PROSECUTOR:	He testified he wasn't the aggressor because I asked him about it.
THE COURT:	Exactly. I mean, you talked to him. You addressed it at length with him.
DEFENSE COUNSEL:	All right. So this is what we - - this is the tape.

While objections do not need to cite specific rules to be sufficient, an objection must be specific in that it is sufficient to apprise the court of the particular error alleged. *Gilliland*, 2010 Ark. 135, at 10, 361 S.W.3d at 285. Gordon failed to apprise the court that the testimony and videotape were inadmissible in the State's rebuttal case because the State did not address a new matter presented by the defense. Gordon's objection failed to apprise the circuit court of the particular error alleged, and, as the State argues, did not preserve this issue for review on appeal.

We also note that, after Hill testified and after the videotape had been played several times, Gordon attempted to renew the objection. As already determined, there was no valid objection and therefore no objection to renew. Additionally, this attempt to object was no more specific than the first attempt and, in any event, it was made after the evidence had been presented. A contemporaneous objection must be made. *Hamilton v. State*, 348 Ark. 532, 538, 74 S.W.3d 615, 618 (2002). Even if the second objection had been sufficient, it was made too late.

Gordon also argues that the circuit court abused its discretion in limiting the scope of his expert's testimony. Allen Quattlebaum testified that he had over thirty years of experience in law enforcement, that he had supervised homicide investigations for the Little Rock Police Department, and that he had participated in approximately 300 homicide investigations. Gordon asked Quattlebaum if he was qualified to form an opinion and testify about "a police investigation into a homicide." After voir dire by the State, the circuit court ruled that Quattlebaum was qualified to testify regarding homicide investigations. While Gordon examined Quattlebaum regarding his opinions about the investigation into the homicide, he also sought his opinion about what a person experiences when he or she shoots another person. Gordon asked Quattlebaum whether he had ever shot anyone, and Quattlebaum responded that he had. He was then asked, "Now, based on your training and experience, will you tell us what happens to a person or what a person experiences when they are in the process or when they're shooting someone?" The State objected. The circuit court permitted Gordon to proffer Quattlebaum's testimony. Defense counsel stated that it would be testimony explaining that "when you start shooting someone you have tunnel vision . . . you

revert to your training . . . and [it] is common not to hear the sound of the weapon discharging or to know how many shots were fired." The circuit court ruled that Gordon had failed to show some reasonable basis demonstrating that Quattlebaum had the requisite knowledge to testify as an expert on those issues.

If some reasonable basis exists demonstrating that a witness has knowledge of the subject beyond that of ordinary knowledge, the evidence may be admissible as expert testimony under Arkansas Rule of Evidence 702. *See Flowers v. State*, 373 Ark. 127, 133, 282 S.W.3d 767, 772 (2008) (quoting *Flowers v. State*, 362 Ark. 193, 210, 208 S.W.3d 113, 127 (2005)). The decision of a circuit court to admit or exclude expert testimony is reviewed on an abuse of discretion standard. *See Vance v. State*, 2011 Ark. 243, at 27, 383 S.W.3d 325, 343. What a person experiences when shooting another person is a subject beyond that of ordinary knowledge. However, nothing in Quattlebaum's history or his extensive background in law enforcement indicated that he was qualified to testify regarding what goes on in the mind of a person when he or she shoots another person. We find no abuse of discretion in excluding Quattlebaum's testimony on this subject.

Gordon also asserts that the circuit court erred in refusing to permit him to further examine and "requalify" Quattlebaum to testify on the subject. The circuit court refused permission, stating that Quattlebaum might be able to testify regarding what he experienced but not what Gordon or others would experience when shooting a person. Gordon did not proffer anything that would have shown some reasonable basis demonstrating that Quattlebaum was qualified to testify as an expert on what a person experiences when he or she shoots another person.

> Our rules of evidence require that when challenging the exclusion of evidence, a substantial right of the party must be affected and the party must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context.

Nelson v. State, 2011 Ark. 429, at 9–10, 384 S.W.3d 534, 539. The failure to proffer the testimony precludes review of this point. *Id.* at 10, 384 S.W.3d at 539. We find no abuse of discretion and affirm the circuit court on this issue.

Pursuant to Arkansas Supreme Court Rule 4-3(i) (2012), the record has been reviewed for all objections, motions, and requests made by either party that were decided adversely to Gordon, and no prejudicial error has been found.

Affirmed.

Craig Lambert, for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.