

STATE OF LOUISIANA

*

NO. 2000-KA-1347

VERSUS

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COURT OF APPEAL

THOMAS ROSS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-285, SECTION "I"
HONORABLE RAYMOND C. BIGELOW, JUDGE

JAMES F. MC KAY, III
JUDGE

(Court composed of Chief Judge William H. Byrnes, III, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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**CONVICTION AFFIRMED,
SENTENCE VACATED AND
REMANDED**

STATEMENT OF CASE

On April 15, 1999, the defendant, Thomas Ross, was indicted for the second degree murder of Daniel Graham. The defendant entered a plea of not guilty at his arraignment on April 22, 1999. After suppression hearings on May 14, 1999, June 3, 1999, and August 6, 1999, the trial court denied defendant's motions to suppress identifications and statements. A jury trial was conducted on September 20-21, 1999. The defendant was found guilty of manslaughter. On September 28, 1999, the defendant filed motions for new trial and appeal. A hearing on the motion for new trial was set for December 15, 1999. The motion for appeal was granted and a return date of December 8, 1999 was set. The defendant was sentenced on January 14, 2000, to serve ten years at hard labor. At the sentencing hearing, the defendant filed oral motions for new trial and to reconsider sentence. The trial court denied the motion to reconsider sentence and motion for new trial on January 26, 2000. Defendant filed another motion for appeal on February 18, 2000. The trial court granted the motion for appeal and set a return date

of April 19, 2000.

STATEMENT OF FACT

Jean Graham testified at trial that her two sons, Jason and Daniel Graham, moved to New Orleans approximately one week before Daniel's death. She stated that Daniel had attended the University of New Orleans in the past and intended to return to the school.

Officer Jimmy Davis, a Crime Lab technician, processed the crime scene on February 28, 1999. The officer took photographs of the scene and recovered two bullet casings, a semi-automatic .9mm and the victim's clothing from the scene. The firearm was loaded; it had eight Carbon .9mm Luger bullets in it.

Officer Gary Barnes responded to the initial call of the shooting. When the officer arrived on the scene, he observed several bystanders standing around a young white male in dark clothing lying on the street at the intersection of Decatur and Governor Nichols. The white male had a bullet hole in the chest area. Officer Barnes secured the area while the EMS technicians worked on the victim. The officer tried to gather witnesses until other officers arrived to assist.

Dr. Gary Traylor, a pathologist, performed the autopsy on the victim, Daniel Graham. Dr. Traylor testified that the victim sustained two gunshot wounds. One of the bullets entered near the rib cage, and perforated several organs and the aorta. This wound was fatal as it caused massive bleeding. The second bullet entered the abdomen and exited in the area of the upper portion of the left buttock. The physician retrieved one bullet from the victim's body during the autopsy. Chemical analysis of the victim's blood revealed a blood alcohol level of .25.

Detective Lionel Parker traced the weapon used in the shooting. The officer learned that the defendant had purchased the gun on August 17, 1998, from Laura's Shooting Center in Laurel, Mississippi. At the time of purchase, the defendant gave his address as 310 Cedar Street, Heidelberg, Mississippi.

At approximately 1:30 p.m. on February 28, 1999, Officer Marlon DeFillo was conducting a traffic control in the seven hundred block of St. Louis Street, when he was flagged down by an individual who indicated that he had observed a bullet casing in the street. Officer DeFillo knew of the shooting incident, which had occurred in the area earlier that morning and connected the casing to that incident. The officer observed the casing, which was located near the door of a restaurant that was being renovated. The

officer contacted the Crime Lab. A crime lab technician came out to the scene and recovered the .9mm Luger casing.

Officer Byron Winbush is a firearms examiner with the Crime Lab. Officer Winbush examined the three casings and the weapon found on the scene and the bullet retrieved during the autopsy. The officer determined that the casings and the bullet were fired from the weapon found on the scene.

Detective John Ronquillo assisted in the homicide investigation. The officer recovered some of the victim's clothing at Charity Hospital. The officer identified the clothing at trial.

Officer Joseph Tafaro, a criminalist with the Crime Lab, testified that he examined both the defendant and victim's clothing for gunpowder residue. None of the clothing had any gunpowder residue.

Detective Marco Demma led the investigation into the death of Daniel Graham in early morning hours of February 28, 1999. The defendant, Thomas Ross, was arrested for the murder that same morning. Detective Demma arrived on the scene at approximately 4:30 a.m. At that time, district personnel had secured the scene and the victim had been taken to Charity Hospital. The officer observed the victim's clothing on the scene. The officer also noticed blood in the street and two spent .9mm casings. A

weapon was recovered a few blocks from the shooting scene. The weapon, a .9mm Teltec semi-automatic, was found on a parked vehicle, a blue Ford Taurus, at #85 French Market Place. The defendant had been detained by a French Market security officer. Several individuals identified the defendant as the person who fired shots at the victim.

Officer Demma accompanied the defendant to the homicide office where the officer advised the defendant of his rights. The defendant indicated that he desired to waive his rights and give a statement. The defendant waived his rights and made a brief statement. The defendant indicated that he had been inside the Crystal Lounge with his girlfriend, Tiffany Ingram, when he noticed an individual staring at him. At that point, the two men had words. Some obscene gestures were made back and forth between the defendant and the victim. The defendant indicated that when he turned to leave, he realized the victim was getting up from the table. The defendant thought that someone was coming after him so he fled out of the bar and onto Decatur Street. When he turned, he saw that the victim was coming behind him. The defendant took out his gun and ordered the victim to stop. The victim did not stop but kept advancing towards him. At that point, he fired a warning shot. The victim continued advancing towards him. The defendant then fired at the victim. The victim was shot and fell to

the ground. The defendant fled to his vehicle where he was stopped.

Jason Graham, the victim's brother, testified that he and his brother had been living in New Orleans for approximately one week at the time of the shooting. They had a few glasses of wine before they went out that evening. They arrived at the Crystal Lounge at approximately 3:00 a.m. and sat in a booth. Jason and Daniel each ordered a beer. The defendant approached their table and asked Daniel "Are you looking at me?" Daniel said no. The defendant then knocked over a drink on their table and walked away. Jason testified that neither he nor his brother pointed at or gestured to the defendant. After the defendant knocked over the drink, Jason and Daniel decided to leave. As they were walking out of the lounge, Daniel passed Jason and saw the defendant in the street. Daniel went after the defendant. Daniel screamed something to the defendant. When Daniel and the defendant were about two feet apart, Daniel grabbed for the defendant's arm. Jason saw the defendant and Daniel struggling. He heard a shot and then saw Daniel fall to the ground. The defendant ran towards Governor Nicholls Street. Jason ran to Daniel and stayed with him until the emergency medical technicians arrived. The doorman from the Crystal Lounge tried to help. The EMS unit took Daniel to the hospital. Jason testified that Daniel was unarmed. Jason identified the defendant on the scene as the person who shot

his brother.

Michael Crocker was standing outside the Crystal Lounge at the time of shooting. At trial, he testified that he observed two men walking out of the Crystal Lounge. The two men were walking close to each other. They had a casual demeanor. They turned the corner on Governor Nicholls towards Rampart Street. A few minutes later, he heard a gunshot. He went to see what was happening. The victim said something to the defendant. The witness could not understand what was said. He then heard two more gunshots and saw the victim fall to the ground. The victim was not armed. In fact, the victim had his arms out to the side at the time the last two shots were fired. The defendant ran towards the French Market after the shooting. The witness identified the defendant as the person who shot the victim.

Larry Martin was employed as a security officer for the French Market. He was on patrol in the early morning hours on February 28, 1999, when he heard gunshots in the direction of Governor Nicholls and Decatur Streets. Martin looked towards that area and saw a suspect running. A female was running next to the subject. The officer observed several people running after the suspect. The suspect ran towards a vehicle parked on French Market Place. The suspect went to the driver's side of the vehicle and attempted to unlock the door. Martin approached the suspect and told

the suspect to stop. Martin asked the suspect, later identified as the defendant, if he had a weapon. The defendant responded affirmatively. Martin told the defendant to put the gun down. The defendant took the gun from his right coat pocket and placed the gun on the car. Martin then directed the defendant to lie on the street in a prone position. Martin told the female to drop her purse and lie on the ground next to the defendant. Both the defendant and the female complied. The people chasing the defendant told the officer that the defendant had just shot someone. The defendant said he shot the person in self-defense. The defendant told the officer that he carried the gun for protection. The defendant stated that a guy in the bar had attacked him and hit him in the head. The defendant indicated he fired a warning shot but when the guy would not stop, he shot the guy twice in the abdomen. After obtaining this information from the defendant, Martin radioed for assistance. Martin noted that the defendant's demeanor during this incident was calm.

Cody Allison was employed as bouncer at the Crystal Lounge on the night of the shooting. He was sitting inside the front door checking identifications when he heard a gunshot. Allison went outside and saw two men struggling in the middle of the street. The defendant was holding the victim while the victim was attempting to get away. Two shots were fired.

The victim fell to the ground and the shooter ran off towards Governor Nicholls Street. Allison went to assist in providing first aid to the victim. Allison identified the defendant as the person who shot the victim.

Dr. William Martin, a neurologist, also testified on behalf of the defendant concerning defendant's prior head injury. The defendant had suffered a cerebral contusion in a motorcycle accident in 1994. Dr. Martin summarized the defendant's medical treatment for this injury. The witness admitted that he did not treat defendant for this injury. Dr. Martin stated that the records indicate that the defendant's MRI scans were normal a few months after the accident. The witness opined that the defendant should avoid any type of altercation that could result in injury to his head.

Tiffany Ingram, the defendant's girlfriend, testified that she and the defendant lived together in Gulfport, Mississippi. She described the defendant as a kind, considerate, polite and good-natured individual. She stated that on Saturday nights, she and the defendant would go to the Crystal Lounge for its Gothic dance night. They would usually arrive around 11:00 p.m. and leave between 2:00 a.m. and 3:00 a.m. They would attempt to park close to the lounge. When they went to the Crystal on Saturday, February 27, 1999, one of their friends, Melissa, went with them. Her boyfriend was supposed to meet her at the lounge. They parked near the French Market

that night. Both Tiffany and the defendant were dressed in Gothic costume. While at the Crystal Lounge, Tiffany had one glass of wine and the defendant had two gin and tonics.

They decided to leave at approximately 3:30 a.m. As they walked through the club, they told their friends goodbye. Tiffany was talking to some friends when she noticed the defendant had approached some guys sitting in a booth. She observed the defendant was shaking his head and looked upset and disgusted. The defendant then ran towards her and tapped her on the shoulder. She followed him out of the lounge and caught up with him outside. She turned around and saw someone running out of the club. She noticed the victim standing in front of the defendant. The defendant told the victim to stop and leave him alone. The victim continued to approach the defendant. The defendant then took out his gun and fired a warning shot. The victim lunged at the defendant. The defendant ran backwards away from the victim. After the warning shot, the witness froze. She heard screaming and yelling between the victim and the defendant. She could tell the defendant was trying to get away. The victim appeared to be attempting to punch the defendant. The witness heard another gunshot and saw the victim fall. She saw the defendant fall backwards and heard another gunshot. The defendant then ran towards his vehicle. The witness noticed

people coming up to the right side of her. She followed the defendant and ran towards the vehicle. When she approached the car, she saw the defendant with his hands up and a police officer with his gun drawn. The officer told her to get down on the ground, and she complied with his order. The defendant was crying. He told the officer that he acted in self-defense and that the victim was trying to hit him in the head. The officer handcuffed her. She was put in the back seat of a police vehicle. No one advised her of her rights. She was later taken to the homicide office where she gave a statement. The witness stated that the defendant had the gun for protection. The witness had previously been a victim of a purse snatching, and her mother had been robbed, kidnapped and raped.

Richard Devonport was employed as in-house security at the Crystal Lounge during the early morning hours of February 28, 1999. The witness testified that he knew the defendant and his girlfriend, as they were regulars at the lounge. The defendant and his girlfriend were polite and never caused problems. Devonport also stated that he knew Cory Alison. Alison was not employed by the Crystal Lounge. Alison was employed by the company that was doing a production at the lounge on the night in question. At the time of the shooting, the witness was situated inside the front entrance, checking identifications and taking money. He saw the defendant leave the

lounge with Tiffany behind him. There were several people following Tiffany. The witness testified that as he was about to look out the front door, he heard a gunshot. The witness paused for a few seconds and then went outside. He saw the defendant and the victim in the street. The defendant told the victim to get away from him. The victim tried to grab the defendant who was holding a gun. It appeared that the victim was reaching for the gun. The defendant was trying to back away. The witness then heard two gunshots and observed the victim fall to the ground. The defendant then ran away. The witness went inside the lounge and called 911.

Celeste Rose, the manager of the Crystal Lounge, testified that she knew the defendant as a regular at the lounge. She stated that he never got violent at the lounge and was courteous and polite. She further testified that she did not see the incident and did not know the victim.

The defendant, Thomas Ross, testified that he was in the United States Army from 1990 to 1994. During his military career, he was, at one time, a military police officer while stationed in Korea. He had extensive training in the use of firearms. In 1994, he suffered head injuries as a result of a motorcycle accident. At the time of the present incident, he was living in Mississippi with his girlfriend. On Saturday nights, he and his girlfriend would travel to New Orleans and go to the Crystal Lounge. They would

park as close as possible to the lounge. On February 27, 1999, he attended a barbecue at his girlfriend's mother's house. While there, he and his girlfriend's brother had target practice. After the barbecue, the defendant went home and took a nap. Later that evening, the defendant and his girlfriend went to New Orleans. They parked in the French Market and arrived at the Crystal Lounge at approximately 11:00 p.m. They were at the lounge until 3:15 a.m. when they decided to leave.

The defendant and his girlfriend were slowly making their way to the front door of the lounge when the defendant noticed some movement out of the corner of his eye. He saw one man poking his head around the back of another man who was sitting on the outside of a booth. The defendant walked over to the two men to learn what the man was saying to him. When the defendant approached the booth, he asked the victim, "What you'd say?" The victim responded with the same words and the same tone. At first, the defendant thought the victim could not hear him or that the victim thought the defendant was making fun of him. The victim then said "I can't hear you." The defendant realized the victim was mocking him. The defendant called the victim an "a--hole and said "f--- you." The defendant then made a hand gesture to the victim and walked away to rejoin his girlfriend. The defendant stated that he did not spill a drink on the victim's table. The

defendant had walked a few steps away when he heard a disturbance behind him. He saw the men from the booth get up and walk towards him. The defendant knew he had to get out of the bar.

The defendant testified he told his girlfriend that he was leaving as he walked out of the lounge, and she followed him. When he got out of the lounge, he turned and saw the men leaving the bar. The defendant was walking towards his car when he felt something on his back. When he turned, he saw the victim standing in front of him. The defendant told the victim to stop as he was armed. The victim kept pursuing him. They were only three feet apart. The victim lunged at him, and the defendant fired a warning shot. The victim then grabbed the defendant and pushed him backwards. The defendant was able to break away from the victim. However, the victim continued to pursue the defendant. The defendant fired his gun at the victim. The victim fell backwards on the ground, and the defendant ran towards his car. When he got to his vehicle, he saw a police officer that told him to stop. The officer had his weapon drawn. The officer told the defendant to put his weapon down and lie on the ground. The defendant put his gun on his car and lay down on the ground. The officer then put his foot on the defendant's back, put his gun to the defendant's head and asked the defendant, "What happened?" The defendant told the officer

he shot the victim in self-defense. The defendant admitted that he was carrying a concealed weapon on the night of the incident.

Dr. Aaron Friedman testified for the State on rebuttal. Dr. Friedman, a neurologist, reviewed the defendant's medical records concerning the motorcycle accident the defendant had while in the military in 1994. Dr. Friedman testified that the defendant's case did not fit the diagnosis of second impact syndrome or post concussive syndrome. The witness noted that the defendant did have some brain injury in 1994 as a result of the motorcycle accident but noted that the injuries were resolved. Tests taken a few months after the accident indicated defendant's brain activity was normal.

ERRORS PATENT

A review of the record for errors patent reveals two errors. First, the trial court sentenced the defendant prior to ruling on the motion for new trial. The trial court sentenced the defendant on January 14, 2000. The hearing on the motion for new trial did not occur until January 26, 2000, at which time the trial court denied the motion for new trial. A motion for a new trial must be filed and disposed of before sentence. La. C.Cr.P. art. 853. The failure to rule on defendant's motion for a new trial prior to sentencing requires that the sentence be vacated and the case remanded for

resentencing. State v. Lambert, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So.2d 739, writ denied, State ex rel. Lambert v. State, 2000-1346 (La. 1/26/01), ____ So.2d. ____ .

The second error occurred when the trial court granted defendant's first motion for appeal before sentencing the defendant. Although a defendant may only appeal from a final judgment of conviction where a sentence has been imposed, this court has held that the appeal will not be dismissed when the sentence was imposed after the granting of a motion for appeal. State v. Bryant, 98-1115 (La. App. 4 Cir. 8/4/99), 744 So.2d 108, writ denied, 99-2617 (La. 3/17/00), 756 So.2d 322.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the trial court erred when it denied his motion for new trial, as the State failed to produce sufficient evidence to prove that the defendant did not act in self-defense.

The standard of reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 278, 61 L.Ed.2d 560 (1979); State v. Rosiere, 488 So.2d 965 (La. 1986). The

reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La. App. 4 Cir. 1989).

Manslaughter is a homicide, which would be either first or second degree murder, but the killing is committed in "sudden passion or heat of blood caused by provocation sufficient to deprive an average person of his self-control and cool reflection." La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not separate elements of the offense but are mitigating factors, which exhibit a degree of culpability less than that present when the homicide is committed without them. State v. Lombard, 486 So.2d 106 (La. 1986).

A homicide is justifiable if committed by one in defense of himself when he reasonably believes that he is in imminent danger of being killed or receiving great bodily harm and that the homicide is necessary to save

himself from that danger. La. R.S. 14:20(1). When a defendant claims self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. State v. Lynch, 436 So.2d 567 (La. 1983); State v. Brumfield, 93-2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312. Regarding self-defense, it is necessary to consider whether the defendant had a reasonable belief that he was in imminent danger of losing his life or receiving great bodily harm and whether the killing was necessary, under the circumstances, to save the defendant from that danger. State v. McClain, 95-2546 (La. App. 4 Cir. 12/11/96), 685 So.2d 590. In order for the defendant's actions to be justified, the force must be reasonable under the circumstances and apparently necessary to prevent an imminent assault. La. R.S. 14:19; State v. Golson, 27,083 (La. App. 2 Cir. 6/21/95), 658 So.2d 225. Although there is no unqualified duty to retreat, the possibility of escape is a factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid the danger. State v. McClain supra. However, a defendant who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that the defendant desires to withdraw and discontinue the conflict. La. R.S. 14:21.

In the present case, the defendant admitted he shot the victim. At trial, the defendant stated that he could only remember shooting the defendant once after firing a warning shot. However, eyewitness testimony and medical evidence reveals that the defendant shot the victim twice after firing a warning shot. The testimony also reveals that the victim was not armed at any time during the altercation. While the victim may have attempted to strike the defendant with his fist, the victim never produced a weapon. The testimony reveals that the defendant shot the victim knowing that he was not armed. The evidence presented also suggests that the defendant did not suffer any injuries as a result of the altercation. In addition, the defendant admitted that he was an expert marksman and had been practicing with the weapon on February 27, 1999. The testimony revealed that the defendant had been military police officer at one time during his military career and was in one of the more elite units of the United States Army.

Thus, the evidence reveals that the State met its burden of proving that the defendant did not act in self-defense. The defendant used excessive force to protect himself from an unarmed man.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also argues that the trial court erroneously failed to admonish the State during rebuttal argument. During rebuttal argument, the prosecutor made the following statement after showing the jury the videotape of the defendant's second confession.

But, the reason I played that is the only person is clear that has several versions of what happened on that night is the defendant. He gets there in his statement and he talks about, wait a minute, I feel hands on my back grabbing me. Oh wait a minute, no, that's wrong. That's wrong. I felt hands striking me in the back. And then he comes into court today and says, oh, he beat me upside the head, both sides the head, several times. Where are the injuries. They complain that one person, one person got injuries, didn't seek any medical attention, didn't do anything about that. Didn't tell the police, no one.

You know, and it's so, it's just, you know, I told you, you would be offended. I'm offended. The utter lack, there is just no shame on this person's part for what he did. And I'm glad they played that first statement because he said I'm not ashamed of what happened. I'm not ashamed. And these are crocodile –

The defendant objected claiming the prosecutor misquoted the evidence.

The trial court then instructed the jury that “[c]losing arguments, ladies and gentlemen, as I’ll tell you later, what the attorneys say in their closing arguments is not evidence. It’s their appreciation of what the evidence has shown. So you’ve got to rely on your own memory as to what the videotape said.”

As the trial court admonished the jury after the defendant's objection, it appears that the trial court maintained the defendant's objection. As such,

the defendant should have sought a mistrial to insure that this matter would be reviewable on appeal. As defendant did not request a mistrial, this issue is not reviewable on appeal.

La. C.Cr.P. art. 774 provides:

The argument shall be confined to the evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.

The argument shall not appeal to prejudice.

The state's rebuttal shall be confined to answering the argument of the defendant.

In State v. Langley, 95-1489, p. 7 (La. 4/14/98), 711 So.2d 651, 659, the Supreme Court stated:

In any event, prosecutors are allowed broad latitude in choosing closing argument tactics. See, e.g. State v. Martin, 539 So. 2d 1235, 1240 (La. 1989). Although under La. C.Cr.P. art. 774 closing argument must be "confined to the record evidence and the inferences which can reasonably drawn therefrom," both sides may still draw their own conclusions from the evidence and convey such view to the jury. State v. Moore, 432 So. 2d 209, 221 (La. 1983), cert. denied 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). "Before allegedly prejudicial argument requires reversal, the court must be thoroughly convinced that the jury was influenced by the remarks and that such contributed to the verdict." State v. Taylor, 93-2201, p. 21 (La. 2/28/96), 669 So. 2d 364, 375; State v. Jarman, 445 So. 2d 1184, 1188 (La. 1984). We also ask whether the remarks injected "passion, prejudice or any arbitrary factor" into the jury's recommendation. Moore, 432 So. 2d at 220.

In the case at bar, the prosecutor's statement on the defendant's lack of shame was simply the prosecutor's own conclusion after viewing the videotapes of the defendant's statements. One of the videotapes was presented to the jury during the defendant's closing statement. The other videotape was shown during the State's rebuttal argument. During one of the videotaped statements, the defendant made the comment that he was not ashamed. Clearly, the prosecutor's statement was within the scope of rebuttal.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

Lastly, the defendant suggests that the trial court erred when it refused to re-instruct the jury on self-defense. Prior to deliberations, the trial court instructed the jury on the law applicable to the case, including second degree murder, manslaughter and self-defense. After deliberating for approximately two and one half-hours, the jury requested that the trial court re-instruct it on second degree murder and manslaughter. The trial court complied and provided the jury with instructions on second degree murder and manslaughter. The defendant then sought to have the trial court also instruct the jury on self-defense. The trial court denied the defendant's request. As the jury did not seek instruction on self-defense, the trial court was correct to

deny the defendant's request. To have instructed the jury on self-defense without a request by the jury could have been viewed as a comment on the evidence by the trial court and an implied suggestion to the jury that they reconsider self-defense.

This assignment is without merit.

Accordingly, the defendant's conviction is affirmed. Defendant's sentence is vacated and the matter remanded for resentencing.

**CONVICTION AFFIRMED,
SENTENCE VACATED AND
REMANDED**