

STATE OF MINNESOTA

IN SUPREME COURT

A08-1879

Anoka County

Magnuson, C.J.

State of Minnesota,

Respondent,

vs.

Filed: February 18, 2010  
Office of Appellate Courts

Gary H. Tomassoni,

Appellant.

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Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant Anoka County Attorney, Anoka, Minnesota, for respondent.

Roy G. Spurbeck, Assistant State Public Defender, St. Paul, Minnesota, for appellant.

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S Y L L A B U S

The State's improper use of evidence admitted solely for impeachment purposes did not affect appellant's substantial rights.

Affirmed.

## OPINION

MAGNUSON, Chief Justice.

On July 21, 2007, appellant Gary Tomassoni shot and killed his wife of 24 years. A grand jury indicted him for first-degree premeditated murder, in violation of Minn. Stat. § 609.185(a)(1) (2008). Tomassoni admitted killing his wife, and his sole defense was that the killing was not premeditated. The jury found him guilty of first-degree premeditated murder, and he received a sentence of life imprisonment without the possibility of release. He now appeals, arguing that his conviction should be overturned because during closing argument, the prosecutor used evidence that had been admitted solely to impeach Tomassoni's credibility for the substantive purpose of proving premeditation. Tomassoni also raises several arguments in a pro se supplemental brief. We affirm.

Gary Tomassoni and his wife were married in 1983. At the time of the events leading up to the homicide that is at issue in this case, Tomassoni and his wife resided in Blaine, Minnesota, with the younger of their two sons. The Tomassonis' marriage appeared to be happy to their sons and others who knew them. Nothing in the record suggests any history of violence or conflict between them.

On the afternoon of July 20, 2007, Tomassoni and his 14-year-old son went for a bike ride. Later in the evening, Tomassoni went biking again, this time with his wife. The couple returned after dark and Tomassoni's wife went to bed. Their son was in his

bedroom watching television until after midnight, when Tomassoni told him to go to sleep.

At about five o'clock on the morning of July 21, the Tomassonis' son was awakened by a loud noise. He walked from his bedroom in the lower level of the Tomassoni family's split-level home to the upper level to use the bathroom. When he left the bathroom, his father told him to call 911 because an intruder had entered the house. Tomassoni's son made the phone call, and both Tomassoni and his son spoke to the 911 dispatcher. Tomassoni said that his wife may be dead, and that the intruder may have left the house through an open downstairs window.

Police officers quickly arrived at the house, where they found Tomassoni's wife dead, lying face down on her bed. She had sustained two gunshot wounds to the head. Tomassoni and his son were both visibly upset. Tomassoni was sweating and had a cut on his right index finger. He told police that he had been sleeping on the couch in the living room when he was awakened by a sound like a firecracker or a single gunshot. He said that he heard his wife say, "What was that?", and then he went to the bedroom, where he saw her lying face down holding the back of her head.

During their initial sweep of the house in search of an intruder, the police observed blood stains in various locations around the house. There was blood on the bed and on the bedroom floor, on the bathroom sink, on the bathroom floor, on the bath mat, in the kitchen on the telephone and the trashcan, on the stair railings leading to the lower level, and on a light switch downstairs. A window in the lower level of the house was partially

open. The screen had been removed, and was found bent and damaged inside the room. No footprints were observed in the grass outside the window, which was wet with morning dew.

After obtaining a warrant, the police performed a comprehensive search of the home. They recovered a bullet from the headboard near the body, a cartridge casing from the bedroom floor, and four small pieces of blue rubbery material from the floor in the bedroom, bathroom and the lower level of the house.

In a lower-level room, the police found a locked file cabinet and broke it open to examine its contents. Inside, a folder with a blood drop on it contained insurance documents. The same drawer of the cabinet contained a small fire safe with duct tape on the inside of its lid. The safe held a .32 caliber handgun, a pair of blue rubber gloves that had been torn in places, and a second spent bullet casing. A small piece of blue rubbery material was embedded in the slide of the gun.

The police also found a black coat, a shirt, and a pair of shorts in the washing machine. All of the clothing had blood on it and had not been washed. In the pocket of the shorts, police found a set of keys that included the key to the filing cabinet where the gun had been located. A box of blue rubber gloves and a partial roll of duct tape were found in the garage.

The police interviewed Tomassoni at the police station on the morning of the murder, while the search of his home was taking place. Tomassoni told the same story he had told earlier at the house—that he was awakened by someone saying, “Where’s the

money” or “Give me the money,” and then a noise like a firecracker. He believed an intruder had been in the house. After learning about the gun and the gloves in the downstairs filing cabinet and the blood spots found throughout the house, the interviewing officer confronted Tomassoni with this information. Tomassoni appeared nervous and started sweating, but did not admit killing his wife. He was ultimately arrested and charged with the murder.

The following day, Tomassoni spoke with his sister by phone. He told her to help his older son with the life insurance policy in the filing cabinet, and to use the money to pay off debts that Tomassoni owed. Tomassoni also told his sister that he thought he was going crazy. A day or two after that phone call, Tomassoni spoke with an Anoka County child protection worker regarding the placement of his younger son. Tomassoni told the child protection worker that he had shot his wife. The parties agreed before trial that Tomassoni’s statement to the child protection worker could not be used in the State’s case in chief because it was taken in violation of his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

The State presented extensive forensic evidence at trial. The medical examiner who performed the autopsy testified that Tomassoni’s wife sustained two gunshot wounds to the head. One shot grazed the top of her skull and lodged in the headboard. According to the medical examiner, the grazing shot likely occurred first, and the victim then raised her hands to her head in response. This scenario would place the victim’s hands near her head when the second shot was fired, explaining the gun powder abrasions

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