

STATE v. HICKS
649 P.2d 267 (Ariz. 1982)

HOLOHAN, CHIEF JUSTICE.

Appellant, Ernest Floyd Hicks, was convicted after trial by a jury of first degree murder. Appellant was sentenced to life imprisonment.... We affirm.

The essential facts are that the appellant and the victim had both been drinking at the Club 37, a bar in Tucson. Both men were regular patrons of the tavern. At about 11:00 P.M. appellant left the bar and went outside. The bartender, seeing that appellant had left his coat, called after him. Appellant said he would return shortly for his coat.

A few minutes later, the victim left the bar. Mrs. Hatfield and Mrs. Cox, also bar patrons, left a few minutes after the victim's departure. As the women reached their car, they heard the sound of a shot and watched a man walk from the victim's dump truck carrying a long-barreled gun to appellant's car. The man put the gun in the open trunk, closed it and drove away.

The women alerted the occupants of the bar who found the victim in his truck, slumped forward in the driver's seat with a gunshot wound in the back of his head behind his left ear. The police were notified and appellant was arrested several minutes later at the nearby trailer of a friend, Cathy Barrow.

Evidence of Victim's Character

The appellant claims that there was error in the admission of evidence showing the peacefulness of the victim. The state argues that objection to the evidence was waived and the defense raised the issue initially. Defense counsel did remark to the jury in his opening statement that:

Cathy Barrow knew [the victim], had had problems with him in the past. He was a loudmouth. She characterized him as obnoxious, a cutting-type person.

The prosecution apparently sought to anticipate a defense of self-defense. The prosecutor asked four witnesses, all patrons or employees of the Club 37, whether the witnesses had ever seen the victim quarrel or engage in physical violence with anyone at the bar. Defense counsel allowed all but the third inquiry to pass without objection, and his relevancy objection to the third inquiry was overruled. All of the witnesses testified that they had never seen the victim become physically violent, and only one witness had seen him argue with people in the bar.

The defense counsel's objection to the testimony of the third witness concerning the character of the victim should have been sustained..'

In the instant case, the defense had introduced no evidence of the victim's character for the state to rebut. Whatever the defense counsel had in mind by the reference to the victim's nature was never developed in the defense case. We do not believe this remark opened the door for the state to present evidence on the issue. The defense did not follow up with any evidence tending to support the remark in the opening statement. Self-defense was not raised at trial and there was no evidence that the victim was the first aggressor. We therefore hold that it was error to permit the prosecution to present evidence of the victim's peaceful character.

The state urged that the defense waived its objection because on cross-examination, defense counsel asked the fourth witness whether she had ever seen the victim or the defendant fight or argue with anyone at the bar. The state contends that this question waived the previous objection. We disagree. Once an objection has been made and overruled, defense counsel must attempt as best he can to minimize any harm that might flow from the erroneous admission of unfavorable evidence. To do so by asking a question concerning the objected-to evidence does not thereby waive the objection....

Although the testimony was irrelevant and should have been excluded pursuant to rule 404(a), we do not believe that any prejudice to appellant resulted from admission of the testimony. The first two witnesses who testified on the issue did so without objection, so the evidence came before the jury in the first instance without defense objection. We do not believe that the additional evidence from the later witnesses caused any prejudice. In fact, defense counsel used the questioned evidence to appellant's advantage during closing argument. The state's argument, on the other hand, made no reference to the testimony. Furthermore, the testimony was not such that it was likely to evoke sympathy from the jurors.

The judgment of conviction and sentence is affirmed.