FILED
JUN 28 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff - Appellee,) Filed June 28, 1979

vs.)

105
62590

DANNY DEAN MONTGOMERY,)

Defendant - Appellant.)

Appeal from Black Hawk District Court - George L. Stigler, Judge.

Defendant appeals from his conviction of theft in the fourth degree in violation of section 714.1(1), Supplement to the Code 1977, alleging that he was prejudiced by trial court's improper conduct at trial and during jury deliberations. - Affirmed.

Stanford Patterson & Douglas V. Coonrad, of Patterson Law Firm, Waterloo, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Ann Fitzgibbons, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from the trial court's denial of his post trial motions following his conviction of theft in the fourth degree in violation of section 714.1(i), Supplement to the Code 1977. Defendant maintains that he was denied a fair trial in that the trial judge acted with open hostility toward defense counsel and that the trial judge improperly communicated with the jury during deliberations without notice to defense counsel. We affirm.

The trial court has considerable discretion in ruling upon motions for new trial. State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1978); State v. Sheffey, 234 N.W.2d 92, 98 (Iowa 1975). A reviewing court will not interfere unless an abuse of discretion is shown. Id.

I. Defendant first maintains he was prejudiced by the conduct of the trial judge at trial. His claim arises out of an incident where the judge, prior to defense counsel's closing argument, instructed the bailiff to remove a man with braided hair sitting in the front row of the courtroom. The judge later explained that because one identification of defendant had been made from a mug shot showing defendant wearing braided hair, which was not admitted into evidence due to its probable prejudicial effect upon the jury, he feared defense counsel would make what he deemed to be improper references to the man in the courtroom. Following the young man's removal, defense counsel approached the bench, challenged the judge's authority to remove this man from open court, and requested that the matter be taken up before the chief judge of the district. A discussion then followed outside the presence of the jury. The judge refused counsel's request, insinuated that counsel was not telling the truth in maintaining that he had not specifically asked this man to come to court that morning, and instructed counsel that if he did not proceed with closing argument, he would be held in contempt of court.

Affidavits submitted by two jurors stated that they recognized that counsel and the judge were in disagreement on a matter before the bench and that it was apparent from counsel's reactions that he was upset by something the judge had said. Neither juror had heard the judge's voice but one did hear snatches of defense counsel's conversations. Both stated that the incident had been discussed in the jury room. Defendant claims that this in-court incident prejudiced him in the eyes of the jurors and

that the out-of-court confrontation between judge and counsel intimidated defense counsel to such an extent that he was unable to present a proper defense for his client.

A fair trial in a fair tribunal is a basic requirement of constitutional due process. State v. Larmond, 244 N.W.2d 233, 235 (Iowa 1976). A trial judge must be fair and impartial and conduct himself in the trial so as to constantly manifest those qualities. Id; State v. Thornburgh, 220 N.W.2d 579, 585 (Iowa 1974); Wilson v. Ceretti, 210 N.W.2d 643, 645 (Iowa 1973). The supreme court has stated:

> [R]emarks may be made by court or counsel in the heat of battle which on reflection in a less intense situation would not have been voiced. However, the court should at all times be cautious of what he says and does when a jury is present. [Authority] They are particularly sensitive to a judge's views and the revelation of his feelings toward the parties, counsel or witnesses may influence the jury more than evidence.

State v. Grady, 183 N.W.2d 707, 711 (Iowa 1971); see also State v. Browning, 269 N.W.2d 450, 454 (Iowa 1978). To ascertain if defendant is entitled to a new trial, it must be determined whether the words or conduct of the judge would be likely to arouse prejudice against defendant in the minds of the jury. Grady, 183 N.W.2d at 711.

We find that the likelihood defendant in this case was prejudiced in the minds of the jury due to the in-court exchange between judge and counsel is slight. It certainly is not unusual for disagreements between judge and counsel to take place during trial and for the jury to be aware of such disagreements. Here, the jurors' affidavits indicate that they observed nothing more than that. Furthermore, to say that defendant was prejudiced by the judge's conduct is unjustified when the jurors stated that the judge, whose voice could not be heard, seemed fine while defense counsel, whose voice could be heard by one juror, appeared upset. A trial judge cannot be precluded from making an unpopular ruling for fear of upsetting counsel and thus prejudicing defendant. Rather, counsel also is expected to conduct himself appropriately at trial. We find that prejudice sufficient to justify a new trial is not present here.

We also believe that the out-of-court dialogue between counsel and judge did not prevent defense counsel from presenting a proper defense for his client. At that stage of the trial, defense counsel had only to present closing argument. Without a clearer showing of how the defense was prejudiced, we cannot justify a remand for new trial on

this basis.

II. Defendant also asserts that trial court acted improperly in communicating with the jury during deliberations without prior notice to defense counsel. The jury, while deliberating, experienced trouble in recalling the testimony of two witnesses and sent a note with the bailiff asking the judge if it could have a written copy of the witnesses' testimony. The judge received the note while on the bench hearing another case. The prosecutor in this case was also involved in the case then before the judge. The judge denied the jury's request and the jury was so informed by the bailiff. The prosecutor stated she may have remarked to the judge, either before or after the judge's denial, that she thought the jurors were not entitled to transcripts of witnesses' testimony. She further stated her comment, if made, did not influence the judge. The judge stated he could not recall the prosecutor's comment being made. Defense counsel was not informed of this interchange and did not learn of it until after trial.

Private conversations between the trial court and jurors are universally condemned. State v. Cowman, 212 N.W.2d 420, 424 (Iowa 1973). The deliberations of the jury must be kept pure and untainted not only from all improper influences, but from the appearances thereof. Id. "[T]he jury is to be above suspicion and . . . any practice which brings its proceedings under suspicion is to be prohibited." Id. at 425. Nonetheless, misconduct with respect to the jury will not be grounds for a new trial unless prejudice is shown. Id.

It has been recommended that the trial judge should not communicate with the jury on any aspect of the case itself without notice to all parties and reasonable opportunity for them to be present. ABA Standards for Criminal Justice, The Function of the Trial Judge § 5.2(b). But in this case, the judge did not discuss an aspect of the case with the jury but only stated that a transcript of testimony would not be provided it. Defendant does not challenge the merits of this ruling but, rather, challenges the fact of communication itself. We conclude that this indirect, non-private communication between the judge and jury without notice to defendant in no way tainted the jury or prejudiced the defendant.

The trial court's denial of defendant's post-trial motions was proper.

AFFIRMED.