FILED
NOV 19 1979
CLERK, SUPREME COURT

225

IN THE COURT OF APPEALS OF IOWA

BENJAMIN E. PARR,

Plaintiff-Appellant

vs.

THE CITY OF DES MOINES, IOWA; WENDALL NICHOLS, as Chief of Police for the City of Des Moines, Iowa; JERRY J. GREENFIELD, Police Officer for the City of Des Moines, Iowa; JERRY J. GREENFIELD, Individually; WILLIAM G. HANSEN, Police Officer for the City of Des Moines, Iowa; and WILLIAM G. HANSEN, Individually,

Defendants-Appellees.

Filed November 19, 1979

269
2-62008

Appeal from Polk District Court - John E. Hughes, Judge.

Plaintiff appeals judgment for defendants in damages action alleging his motion for new trial, based on jury misconduct, should have been granted. - Affirmed.

Frank G. Wieslander, P.C., Altoona, for plaintiff-appellant.

James Sullivan, Assistant City Attorney, Des Moines, for defendants-appellees.

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

OXBERGER, C.J.

Plaintiff Benjamin E. Parr appeals judgment for defendants in this damages action. Affirmed.

Plaintiff Benjamin E. Parr brought this action seeking damages for an assault and battery that allegedly occurred when the defendant police officers arrested him. After judgment was entered on the jury's verdict for defendants, plaintiff moved for a new trial alleging jury misconduct. Supporting affidavits were introduced but the trial court overruled plaintiff's motion. On appeal, plaintiff asserts juror Moore's false statements during voir dire and his disclosures during jury deliberation constituted jury misconduct and that the trial court should have granted him a new trial.

Jury misconduct is a ground for granting new trial if substantial rights of the aggrieved party have been materially affected. Iowa R. Civ. P. 244(b). Cases discussing jury misconduct were summarized in Harris v. Deere & Co., 263 N.W.2d 727, 731 (Iowa 1978). Harris enunciated a two step process for establishing jury misconduct: procedurally the fact as to what happened must be shown and substantially the effect of those facts must be established. Id. at 729. The key element is the substantive proof of the effect of alleged misconduct and that effect must have been on a material issue in the case to warrant misconduct; it cannot be conduct that simply inheres in the verdict. Id. at 730.

Procedurally, we find the affidavits establish that juror Moore made false answers to questions on voir dire and made extrajudicial disclosures to the jury. We now must measure the effect of those actions.

I. Extrajudicial disclosures.

In this case the central issue litigated was whether plaintiff's injuries were inflicted by the defendant policemen. The jury's task simply was to determine if the policemen caused the injuries. When it sought to determine if someone or something else caused the injuries, it was deciding an indirect issue; although to do so would be natural once it had been determined the defendant policemen had not caused the injuries.

The cases summarized in Harris conclude that when the extrajudicial information directly bears on a material issue, the appellate court will make independent judgment whether new trial is warranted for jury misconduct. However, where, as here, the extrajudicial statement relates to an indirect issue, Harris states the appellate court

will place reliance on the trial court's ability to assess the situation from its superior vantage point and affirm unless an abuse of discretion occurred.

Since Moore's extrajudicial statement was on an indirect issue, the trial court was better situated to determine whether new trial was warranted. We cannot conclude the trial court abused its discretion by denying new trial due to Moore's disclosure.

II. False answers on voir dire.

Moore's affidavit states he failed to disclose his arrest record when questioned on it during voir dire. Moore was one of two jurors who voted for plaintiff in the final jury ballot. Therefore, plaintiff was not prejudiced by Moore's presence on the jury.

We are aware if Moore had not been on the jury the issue concerning inmate assaults might not have been considered by the jury. We believe the effect of Moore's disclosure must be examined on its merits alone, however, and as stated in Division I, we do not find the effect of the statement warrants new trial.

AFFIRMED.

Snell and Johnson, JJ., dissent.

SNELL, J. (dissenting)

I respectfully dissent. There are three significant facts in the record of this case that require consideration: (1) juror Moore falsely stated on voir dire that he had never been arrested; (2) during jury deliberations, juror Moore related his arrest experience to the other jurors, including his witnessing of an incident of one inmate assaulting another while both were incarcerated in the "bull pen" area of the Des Moines City Jail; (3) after juror Moore related this account of his arrest experience, the jury vote changed from five in favor of plaintiff and seven undecided to nine in favor of defendant and three in favor of plaintiff.

The majority concedes that if the extrajudicial information — in this case, juror Moore's arrest experience as related to the other jurors — directly bears on a material issue, we then independently judge whether a new trial is warranted for juror misconduct. The majority avoids reaching this independent judgment by stating that whether someone or something else injured plaintiff bears only indirectly on the material issue of whether the policemen injured plaintiff.

The majority states:

> The jury's task simply was to determine if the policemen caused the injuries. When it sought to determine if someone or something else caused the injuries, it was deciding an indirect issue; although to do so would be natural once it had determined the defendant policemen had not caused the injuries.

Since the evidence is sufficiently strong to show that plaintiff was in fact injured, the conclusion that the policemen did not cause those injuries does not leave an indirect issue of whether someone or something else caused those injuries. If the policemen didn't injure plaintiff, then someone or something else did. Logic dictates that if that proposition is true, then the converse is also true. Consequently, the jury could just as easily have reached the conclusion that the policemen didn't injure plaintiff by reasoning that someone or something else did. Such reasoning would be perfectly natural once juror Moore introduced the extrajudicial information concerning his witnessing of one inmate assaulting another in the Des Moines City Jail "bull pen." The drastic change in the jury vote bears this out. Thus, the extrajudicial information in this case could clearly have had a direct, bearing on its determination of the material

issue of whether the policemen injured plaintiff.[1] This sufficiently establishes material misconduct to the extent that a new trial is warranted. Vincent v. Goodman, 568 S.W.2d 907, 908-10 (Tex. Civ. App. 1978).

The trial court concluded that juror Moore's relating of the extrajudicial information necessarily inhered in the verdict. However, this was not information that was based on "experiences which are common to men generally." State v. Manning, 224 N.W.2d 232, 236 (Iowa 1974) (quoting Purcell v. Tribble, 101 Iowa 24, 27, 69 N.W. 1120, 1121 (1897). This juror was not only not speaking from an experience "common to men generally," but from experience that may well have precluded him from serving on the jury, had he not falsely stated on voir dire that he had never been arrested. In fact, the failure of a juror to respond truthfully on voir dire is alone sufficient to warrant a new trial, even without any showing of bias or prejudice, on the ground that it denies counsel the right to select an impartial jury. Pierce v. Altman, 147 Ga. App. 22, 22-23, 248 S.E.2d 34, 35 (1978) ("If justice is to be blind, truth in the courtroom must never be doubted."). I cannot conclude that the introduction of such extrajudicial information to the jurors necessarily inheres in the verdict.

The juror misconduct arising out of juror Moore's false statements on voir dire and his relating of extrajudicial information to the other jurors is clear. The prejudicial effect was evidenced by the drastic change in the juror vote following the relating of the extrajudicial statement to the other jurors. Consequently, I conclude that substantial rights of plaintiff have been materially affected to the extent that a new trial is warranted. Iowa R. Civ. P. 244(b). I would therefore reverse the judgment of the trial court and remand for a new trial.

Johnson, J., joins this dissent.

---

[1] Two juror affidavits stated that several jurors acknowledged that plaintiff was uninjured at the time he was taken into custody by the defendant policemen. The affidavits further stated that after juror Moore's disclosure, the possibility that plaintiff was injured while in the cell became the exclusive subject of deliberation.