FILED
JAN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DAVID GREGORY and MARK MORROW,

Plaintiff-Appellants,

vs.

RUDY SAVILLE and CITY OF OSCEOLA,

Defendants-Appellees.

Filed January 30, 1981

0-346
2-63929

Appeal from Madison District Court - James E. Hughes, Judge.

Plaintiffs appeal trial court's overruling their motion for new trial. AFFIRMED.

Michael J. Streit of Morr & Shelton, P.C., Chariton, and C. R. Willis, St. Louis, Missouri, for plaintiffs-appellants.

William F. Fanter of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for defendants-appellees.

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

PER CURIAM

Plaintiffs appeal the trial court's overruling their motion for a new trial. We affirm.

On July 16, 1976 plaintiffs David Gregory and Mark Morrow were in Tony's Bar in Osceola, Iowa, when a fight erupted. At about 12:30 a.m. Officer Rudy Saville, together with a fellow officer from the Osceola City Police Department, entered the premises to quell the disturbance. Officer Saville's pistol discharged and thereby caused injuries to plaintiffs. Plaintiffs sued Officer Saville and the City of Osceola, alleging that Officer Saville's negligent handling of his pistol caused plaintiffs' injuries. The case went to trial before a jury, which returned an 11-1 verdict in favor of defendants. Plaintiffs filed a motion for a new trial, alleging that the trial court failed to properly instruct the jury, that the jury did not deliberate for an amount of time sufficient for the return of a nonunanimous verdict, and that an improper communication transpired between the clerk of court and the jury.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on this court if supported by substantial evidence. Knauss v. Komin Industries, Inc., 267 N.W.2d 56, 57 (Iowa 1978); Carson v. Mulnix, 263 N.W.2d 701, 705 (Iowa 1978); Iowa R. App. P. 14(f)(1). We are not, however, bound by the trial court's determinations of law. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 340 (Iowa 1979). In determining whether the evidence is substantial, we construe it in the light most favorable to sustaining the trial court's judgment, and we will not weigh the evidence or pass on the credibility of witnesses. Carson, 263 N.W.2d at 705. We need only consider the evidence favorable to the judgment below, whether or not it is contradicted. Manson State Bank v. Tripp, 248 N.W.2d 105, 107 (Iowa 1976); Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975). A finding of fact is supported by substantial evidence if the finding reasonably may be inferred from the evidence. Grefe, 231 N.W.2d at 865.

I. Plaintiffs contend the trial court erred in refusing to submit to the jury its requested instruction concerning the degree of care required by persons using firearms. In jury instruction #7, the trial court instructed the jury that:

> [A] police officer is required to exercise that degree of care ordinarily used by similar police officers in like

> circumstances and a failure to do so constitutes negligence.
>
> "Ordinary care" is that degree of care which an ordinarily careful and prudent police officer would exercise under the circumstances.
>
> "Negligence" is the want or omission of ordinary care; the failure to do something which a reasonably prudent police officer, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do; or the doing of something which such a police officer, under such circumstances, would not do.
>
> [A]ll persons using firearms are required to use that degree of care commensurate with the dangerous nature of the firearm to the situation then existing.

Plaintiffs submitted and the trial court rejected an instruction predicating defendants' liability on Officer Saville's failure to exercise "[t]he utmost or highest degree of care" or his failure to take "exceptional precautions" in handling his firearm.

The trial court did not err concerning the submission of instructions to the jury. In Hendricks v. Broderick, 284 N.W.2d 209 (Iowa 1979), defendant Broderick accidentally shot plaintiff Hendricks while both were independently hunting turkeys. Hendricks contended on appeal that the trial court erred for its refusal to submit his cause of action to the jury on a theory of gross negligence. The Iowa Supreme Court upheld the trial court's refusal, stating that:

> [W]e do not recognize degrees of negligence for liability purposes. "There are no degrees of care or of negligence in Iowa. [Citations omitted.] The standard is always the care which an ordinarily prudent person would use under the circumstances."

Hendricks, 284 N.W.2d at 214 (quoting Werthman v. Catholic Order of Foresters, 257 Iowa 483, 492, 133 N.W.2d 104, 109 (1965)). The jury instructions submitted by the trial court were geared towards assessing defendants' liability according to a standard of care that an ordinarily prudent police officer would observe under the circumstances. Plaintiffs' suggested instruction presupposes the establishment of degrees of care in Iowa. In light of Hendricks, we conclude that the trial court did not err in submitting jury instruction #7 to the jury and in rejecting plaintiffs' suggested instruction.

II. Plaintiffs contend that the trial court erred in overruling their motion for a new trial on the ground that the jury rendered a nonunanimous verdict based on less than six hours of deliberation in violation of Iowa R. Civ. P. 203(a). The trial court found the jury to have deliberated for six hours and sixteen munutes. According to

plaintiffs, since at least twenty minutes of that time were devoted to restroom breaks, the six hour requirement of rule 203(a) was not satisfied because of the four minute deficit.

Assuming, without deciding, that the jury did not deliberate for the entire six hours, this small difference which occurred when individual jurors made use of the restrooms is of de minimus significance. A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party. Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968). As explained in subdivision III, the jury reached an 11-1 vote in favor of defendants early on in its deliberations and adhered to that vote until the end. There is no reason to think that plaintiffs were prejudiced by the jury's failure to deliberate an extra four minutes. We do not interpret Parker v. Tuttle, 216 N.W.2d 843 (Iowa 1977), where significant periods of time were involved in obtaining meals, as requiring a contrary result.

III. Plaintiffs contend that the trial court erred in overruling plaintiffs' motion for a new trial on the ground of an impermissible communication made by the Madison County Clerk of Court to the jury. Iowa R. Civ. P. 199(b) in part provides that:

> During their [jurors'] deliberations, the officer in charge must not suffer any communication to be made to them, nor to make any himself, except to ask them if they have agreed on a verdict, unless by order of court; nor communicate to any person the state of their deliberations, or the verdict agreed upon before it is rendered.

An affidavit signed by Larry J. Breeding, the jury foreman, furnishes the sole evidence of the Rule 199(b) violation:

> When I contacted the Clerk, as foreman, she had called the judge and informed me that the Judge [sic] had stated that we, a [sic] 11-1 vote, + [sic] after 6 hours, should render the verdict on that basis.

The trial court found that no one advised the jury that it should render a verdict based on a nonunanimous number of jurors, but the clerk was only advised that she was authorized to receive such a verdict if that was the wish of the jury. But even if we assume that the clerk's remark to Breeding constitutes a violation of Rule 199(b), we do not believe that the violation warrants reversal. A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party. Baysinger v. Haney, 261 Iowa 577, 583, 155

N.W.2d 496, 499 (1968). Jury deliberations commenced at 2:06 p.m. on May 25, 1979. The vote on the first ballot taken by the jury at approximately 3:30 p.m. was 11-1 in favor of defendants. The vote distribution remained the same on all subsequent votes until the jury returned its verdict at 9:37 p.m. on the same day. Prior to returning the verdict the jury contacted the clerk and informed her of its wish to return a verdict based on its 11-1 vote. The clerk notified the trial judge of the jury's wish, who replied to the clerk that the jury's nonunanimous verdict could be accepted. Then occured the challenged communication between the clerk and Breeding, which is recounted in the above-quoted excerpt from Breeding's affidavit.

The jury established an 11-1 vote for defendants early in their deliberations and never vacillated from that vote. The challenged communication resulted from a chain of communications initiated by the jury's desire to render a verdict for defendants. Given the jury's unwavering expression of desire to return a verdict for defendants, a desire expressed from early on in its deliberations until the very end, we believe that the challenged communication had no effect whatever on the jury's final vote. Communication with a jury that amounts to misconduct does not constitute reversible error if nothing in the record indicates that the jury could have been influenced thereby. Miller v. Rott, 77 Iowa 545, 549 42 N.W. 502, 503 (1889). In the instant case nothing in the record indicates that the jury was influenced by the challenged communication and much indicates that it was not so influenced.

AFFIRMED.