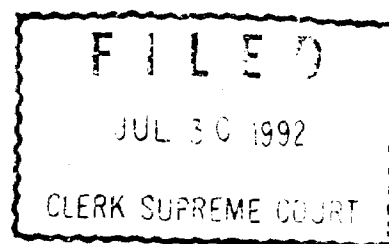


IN THE COURT OF APPEALS OF IOWA

No. 2-231 / 91-1319



STATE OF IOWA,

Appellee,

vs.

LAODIS HIGHTOWER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Peter Van Metre, Senior Judge.

Hightower appeals his conviction of first-degree burglary, contending the district court abused its discretion in denying his motion for new trial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter B. Newell, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., Habhab, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, P.J.

On January 7, 1991, Laodis Hightower and his girlfriend, Felicia Jackson, argued at the home of Felicia's grandmother, Tommie Jackson. Tommie Jackson's granddaughter, Eugenia Humphrey, intervened and offered to fight Hightower. Hightower declined and departed, saying "he was going to get something" for Humphrey.

Hightower returned to Jackson's house in ten minutes, but he was not admitted. He then broke the window and opened the door. He allegedly pointed a CO2 pellet pistol at Humphrey and waved it around the room. When Tommie Jackson told him to leave, he took his daughter and complied.

Hightower was charged with first-degree burglary. Hightower's defense at trial was that he went to the house to get his daughter. He claimed he did not enter the house with an intent to commit an assault. Rather, he maintains he pointed the gun at Eugenia Humphrey as a spontaneous reaction upon seeing her which was triggered by their prior quarrel.

Tommie Jackson testified Hightower broke the glass, but she denied he pointed the gun at her. The State then attempted to introduce Tommie Jackson's prior written statement to the contrary. Jackson testified her daughter, Dorothy Redd, had written the statement, and she had signed it without reading the entire text. The district court sustained Hightower's objection and excluded the written

statement. The district court also prevented the State from introducing the statement during Dorothy Redd's testimony.

The jury found Hightower guilty of first-degree burglary and determined he was in possession of a firearm at the time of the offense. On March 11, 1991, Hightower filed a motion for new trial, alleging Tommie Jackson's signed statement had been inadvertently submitted to the jury during its deliberations. A juror had revealed the mistake to the prosecutor after trial. The prosecutor had then informed defense counsel and the district court.

On April 5, 1991, the district court denied the motion, ruling the evidence in the statement was merely cumulative and was weakened by Tommie Jackson's testimony. On August 15, 1991, the district court entered judgment and sentenced Hightower to an indeterminate prison term not to exceed twenty-five years and imposed a five-year minimum sentence pursuant to Iowa Code section 902.7 (1991). Hightower appeals, contending the district court abused its discretion in denying his motion for new trial.

The district court has "discretion in granting or denying new trials based on fair trial considerations." State v. LaDouceur, 366 N.W.2d 174, 178 (Iowa 1985). We will reverse the district court only upon a showing of an abuse of discretion. Iowa R. App. P. 14(f)(3).

An appellant challenging the denial of a new trial based on jury misconduct must meet three conditions:

(1) evidence from the jurors must consist only of objective facts as to what actually occurred in and out of the jury room bearing on misconduct;

(2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and

(3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Meirick by Meirick v. Weinmeister, 461 N.W.2d 348, 350 (Iowa App. 1990) (quotations omitted). We find the inadvertent admission of Jackson's statement to the jury did not with reasonable probability influence the jury. Because we find the third prong has not been satisfied, we do not address the other conditions.

The pretrial statement contained the following:

I, Tommie Lea Jackson . . . would like to have charges against [Hightower] for breakin into our home, he came into out home without permission he broke our front door window with his gun and came in flashing the gun around and it was small childrens in the home, also he pointed the gun directly at myself and . . . Eugenia Humphrey anyone in the home could of been hurted or killed.

Hightower himself admits the statement was cumulative to other evidence that he pointed the gun at Humphrey and threatened her. He argues the "genuine prejudice" to him dealt with the issue of specific intent to commit an assault. He believes it is conceivable the jury found he formulated the intent to assault Humphrey after entry to the premises. Jackson's statement would have an impact, he claims, if the jury determination he entered with the intent to commit an assault was based on his act of pointing the firearm at Jackson. Because Jackson and

Hightower had not just engaged in an argument, Hightower feels the statement that he pointed the gun at Jackson was prejudicial.

We find no merit in this argument and affirm the trial court denial of a new trial. Humphrey testified at trial that immediately after he entered Jackson's residence Hightower threatened her with a gun. Dorothy Redd agreed in her testimony that he immediately made such a threat. We determine Jackson's statement did not influence the verdict. In front of the jury, Jackson stated her pretrial statement was wrong. She insisted she could not remember ever seeing Hightower with a gun. Due to the cumulative evidence and Jackson's own testimony contradicting her statement, we find the inadvertent admission of this evidence to the jury did not with reasonable probability influence the verdict.

AFFIRMED.