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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,
vs.
JERROLD KENNETH BAKER,
Defendant-Appellant.

Filed October 29, 1985

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5-360
84-925

Appeal from the Iowa District Court for Polk County - Gene L. Needles, Judge.

The defendant appeals from his conviction for first-degree murder. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, Roxann Ryan, Assistant Attorney General, and Mark Feldmann, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

The defendant appeals from his conviction for first-degree murder by claiming the trial court abused its discretion by refusing to grant him a new trial on the ground of juror misconduct. We affirm.

During voir dire of this homicide case, one of the jurors, Rebecca Glunt, expressed an interest in sentencing. At that time the court told the jurors that they should not concern themselves with potential sentences. However, during deliberations at an evening recess the same juror telephoned an attorney friend to ask about the sentencing options for various types of homicide crimes. The attorney apparently offered no information which she did not already know and he reported the conversation to the presiding judge. The juror later commented during deliberations that she had heard of a case in which a twenty-year sentence was imposed for manslaughter. The jury returned a guilty verdict against the defendant, 44, who committed first-degree murder when he killed his seventeen-year-old stepdaughter when she refused to have sex.

When the defendant learned of these matters after the verdict had been returned, he filed a motion for new trial on the ground of juror misconduct. After a hearing, the court denied the motion for new trial. The court concluded that the juror's telephone call to the lawyer constituted misconduct but did not affect the verdict. The court also concluded that the juror's comment during deliberations inhered in the verdict and therefore could not be the basis for impeaching the verdict.

The defendant has appealed, challenging only the denial of new trial.

The trial court has broad discretion on a motion for new trial based on juror misconduct. State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984); State v. Cuevas, 288 N.W.2d 525, 535 (Iowa 1980). The test in Iowa for jury misconduct involves a three-pronged analysis: (1) the evidence from the jurors must consist

only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct, (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation by constituting jury misconduct, and (3) it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984); see also Rhiner v. City of Clive, No. 84-502, slip op. at 26-27 (Iowa Aug. 21, 1985); State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983); Harris v. Deere & Co., 263 N.W.2d 727, 729-30 (Iowa 1978). This case presents two alleged incidents of juror misconduct and we shall review each allegation separately. During deliberations, Glunt telephoned an attorney and inquired about the various sentences for homicide charges and whether Iowa had a death penalty. The attorney confirmed Glunt's conclusion that life imprisonment, not a death penalty, was the maximum penalty in Iowa for murder, but the attorney confessed a lack of familiarity with criminal law and did not suggest a penalty for manslaughter. When the attorney became aware that Glunt was calling in regards to a pending case, the conversation ceased. Glunt's uncontradicted testimony was that this conversation did not provide her with any information she did not already possess.

The first prong of Cullen requires objective facts as to what occurred. A juror may not submit the factors which influenced the verdict because such facts "inhere" in the verdict. Iowa R. Evid. 606(b); State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980). We are satisfied that the facts regarding the telephone conversation are objective facts and, thus, meet the first prong.

Secondly, the statements must exceed tolerable bounds of jury deliberation. We have little difficulty in finding that a juror who contacts an attorney during deliberations and seeks information regarding sentencing has exceeded tolerable bounds of conduct.

Thirdly, the most difficult element under those facts is to determine whether the misconduct was calculated to, and with reasonable probability did, influence the verdict. Courts have stated that this showing is not easy to satisfy because a reasonable probability is significantly different from the lower threshold of a possibility. Cullen, 357 N.W.2d at 28. The test as to whether the asserted misconduct influenced the verdict is objective rather than subjective. State v. Christianson, 337 N.W.2d at 502, 506 (Iowa 1983) (citing Rouse, 290 N.W.2d at 916).

In Christianson, one juror, during the trial on his own accord, called the Veteran's Administration and obtained information which was damaging to the defense. This juror communicated this information with the jurors. Under such facts, the Iowa court could not find that misconduct was present. Based on the record before this court, we cannot find that Glunt's behavior influenced the verdict. Glunt apparently did not acquire any new knowledge about penalties through her conversation with the attorney. The conversation merely confirmed her beliefs. She already knew Iowa did not have a death penalty; first-degree murder resulted in life imprisonment, and she thought she knew the sentence for manslaughter. The attorney did not opine as to the manslaughter sentence because he did not know what sentence it carried.

Moreover, it is of the utmost importance to emphasize that she did not mention to any of the other jurors during deliberations that she had spoken to an attorney. We do not condone the actions of jurors who take it upon themselves to obtain information outside of the record, especially when the court has previously informed the juror that sentencing should not be considered. Nonetheless, we cannot find that Glunt's behavior had a reasonable probability of influencing the verdict under an objective standard because her activities were unknown during deliberations.

A further episode of alleged misconduct by the same juror involved Glunt mentioning during deliberations that she had once spoken to an inmate who supposedly told her that he was serving a twenty-year sentence for manslaughter. (It is worth noting that the maximum penalty for manslaughter in Iowa is ten, not twenty, years.) This incident is markedly different than the previously reviewed incident because Glunt was conveying a personal experience she had before entering the jury room.

Once again Christianson provides guidance for our decision. In Christianson, the defendant was charged with sexual abuse. During deliberations, one juror made reference to her son being a victim of sexual abuse. The court found that while such a comment could arguably inhere in the verdict because it involved the reactions of jurors, prejudice certainly did not result. The court stated:

> Jurors undoubtedly discuss a variety of subjects in considering cases. As a practical matter, courts cannot be too strict on jury discussions or few verdicts could stand. The matters which jurors bring up and discuss in the privacy of their room largely inhere in their verdict. Trial courts have broad discretion in these matters.

337 N.W.2d at 505 (citing State v. Lass, 228 N.W.2d 758, 771 (Iowa 1975)).

Similarly, we are unable to conclude that Glunt's passing reference to a twenty-year manslaughter sentence had a reasonable probability of influencing the verdict. A major issue addressed during deliberation was malice because Glunt's testimony indicated one juror was having difficulty in finding this element. After carefully reviewing the record, we find that the comment Glunt made regarding manslaughter was tangential to the outcome. Glunt discussed manslaughter because she saw similarity between the inmate she had talked to who was convicted of manslaughter apparently for hitting another person over the head with an object during a fight and the defense attorney's comment that manslaughter might involve a situation in which a bottle is used to hit someone

over the head in a barroom brawl. Glunt's reference to the sentence was an inconsequential aspect of her recitation to the jury of her personal experience with someone charged with manslaughter. The comment Glunt made inhered in the verdict. We find no abuse of discretion in the trial court's decision to deny defendant's motion for a new trial. Accordingly, we affirm.

AFFIRMED.