

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

SHAWN PATRICK KIPPES,

Appellant.

Filed September 21, 1978

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61306

Appeal from Pottawattamie District Court - J. L. Larson, Judge.

Defendant appeals conviction of the crime of breaking and entering claiming error in not granting his motion for mistrial based on a juror's reading a local newspaper article. Reversed and remanded.

Gary K. Anderson and Troyce A. Wheeler, Council Bluffs, for appellant.

Richard C. Turner, Attorney General, Raymond Sullins, Assistant Attorney General, and James S. Heckerman, Assistant Pottawattamie County Attorney, for appellee.

Submitted to Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Shawn Patrick Kippes appeals his conviction by jury of the crime of breaking and entering in violation of § 708.8, The Code, 1977. The only issue raised on appeal is whether the trial court erred in overruling defendant's motion for mistrial based upon prejudicial material which appeared in an article in a local newspaper and which was seen by one of the members of the jury and also by the alternate juror.

The part of the newspaper article alleged to be prejudicial is set out below:

He (the defendant) was arrested last October in connection with the break-in and fire at Kirn Junior High School. He was later placed in the State Training School for Boys at Eldora on a different charge.

Defendant alleges this evidence of other crimes would have been inadmissible at trial and if admitted, would have been grounds for a mistrial. See e.g., State v. Johnson, 224 N.W.2d 617, 620-21 (Iowa 1974). Therefore, he argues, because one of the jurors likewise had knowledge of the prejudicial material, it was error for the trial court not to grant the mistrial. Finally defendant argues that even if evidence of the other crimes was admissible under one of the exceptions set out in Johnson, 224 N.W.2d at 619, and announced in State v. Wright, 191 N.W.2d 638, 639-40 (Iowa 1971), the State would still have had the burden to show defendant committed the other crimes in question. He argues mere suspicion is not enough. 224 N.W.2d at 620.

Under the rules announced in Johnson and Wright concerning evidence of other crimes, the part of the newspaper article set out above could not have been admitted into evidence at defendant's trial. There was no proof that defendant participated in the Kirn incident and there was no evidence as to why defendant was subsequently placed in the State Training School.

We now turn to the issue of whether the trial court should have granted defendant's timely motion for mistrial. In State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972), the supreme court stated American Bar Association Standards Relating to Fair Trial and Free Press, Standard 3.5(f) "contains workable guidelines which should be made prospectively applicable" where an issue is raised during trial concerning possible jury exposure to potentially prejudicial material disseminated through the press. The Bigley court then adopted Standard 3.5(f), and Standard 3.4(b) insofar as it is incorporated by reference in Standard 3.5(f). 202 N.W.2d at 58.

The important part of Standard 3.5(f) and on which defendant relies on appeal is as follows:

.... The standard for excusing a juror who is challenged on the basis of such exposure shall be the same as the standard of acceptability recommended in section 3.4(b), above, except that a juror who has seen or heard reports of potentially prejudicial material shall be excused if reference to the material in question at the trial itself would have required a mistrial to be declared. (Emphasis added.)

As it relates to Standard 3.5(f), Standard 3.4(b) provides:

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

Defendant argues that because the two jurors saw the prejudicial portion of the article and because reference to that portion of the article at the trial itself would have been error under Johnson, supra, the trial court erred in overruling his motion for mistrial. Standard 3.5(f), supra; State v. Bigley, supra. Defendant argues the sole remedy to cure the prejudice under the standard is to excuse those jurors who have been exposed.

The newspaper article appeared in the local newspaper the same day as defendant's trial. The evidence had been presented by both sides and the trial was recessed until the next morning at which time the case was to be submitted. At that time defendant brought the article to the attention of the court and the State and requested an interrogation to determine if any juror had read it. One juror and the alternate had read the article. The alternate took no part in the jury deliberations. The regular juror stated she had read the article and was aware of some connection with the Kirn incident prior to reading the article. She stated she had recognized some of the names previously. She also stated that her judgment would not be effected any more than it would have been two days before and that she could still be a fair and impartial juror. Thereafter defendant moved for a mistrial which the court overruled.

Although it appears from the juror's statements that prejudice to defendant did not occur, we find the case does not turn on the juror's state of mind. Standard 3.5(f) adopted by the supreme court incorporates 3.4(b) as the standard for excluding a juror except "if reference to the material in question at the trial itself would have required a mistrial to be declared." In this instance the juror's state of mind would be immaterial.

The case at bar comes within the above exception. Reference to the newspaper article at trial would have required a mistrial to be declared. When the court determined the juror had read the article, defendant's motion should have been granted. State v. Burt, 249 N.W.2d 651 (Iowa 1977), on which the State relies is inapposite to this exception since in that case the court determined inquiry as to the jury's state of mind was not required because the material per se did not raise a serious question of possible prejudice. Such is not the case here.

REVERSED AND REMANDED.