IN THE COURT OF APPEALS OF IOWA

No. 0-322 / 99-0950
Filed July 26, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFERY ALLEN GERARD BAKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Paul W. Riffel, Judge.

Jeff Allen Gerard Baker appeals a jury verdict, judgment and sentence for first-degree kidnapping, second-degree robbery, and operating a motor vehicle without the owner's consent. He claims the court erred in overruling his motion for a new trial. He also contends his counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Thomas H. Miller, Assistant Attorneys General, and Kasey E. Wadding, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MILLER, J.

Defendant Jeff Baker appeals his conviction, following jury trial, of kidnapping in the first degree, robbery in the second degree, and operating without owner's consent. He contends the trial court erred in denying his motion for new trial based upon an alleged threat by one juror to another during jury deliberation. He also requests three ineffective assistance of counsel claims be preserved for possible postconviction relief proceedings. We affirm.

I. Factual and Procedural Background

In the early evening hours of July 20, 1998, Baker began drinking several glasses of beer at the Janesville Tap. He left the bar at about 8:00 p.m., but returned between 9:00 and 9:30 p.m. By the early morning hours of July 21, only Baker and the victim, Shareen, who was working as the bartender, remained.

Shareen began playing a video game. Baker approached her, touched her on the shoulder for a couple seconds, then kissed her shoulder, and asked if she wanted to have sex. She declined. Baker then wrapped his left hand around her neck, choked her, and asked if she wanted to die. He then forced her to the floor, placed himself on top of her, and again asked if she wanted to have sex. This time, she said yes. They then stood up, and Baker ordered her to get the money from the bar. She complied and he took the money. He then told her to get her car keys.

Shareen drove the car down streets and roads as ordered by Baker. At one point, Baker placed her hand on his exposed penis. They eventually arrived at a rock quarry, where Baker forced her to engage in oral sex and vaginal intercourse. Shareen escaped when they stopped at a convenience store.

Baker was apprehended, and after jury trial, was convicted of count I, kidnapping in the first degree; count II, robbery in the second degree; and count III, operating without owner's consent. Baker was sentenced to a life term of imprisonment, without the possibility of parole, on count I, and was sentenced to a term of imprisonment not to exceed ten years and two years on counts II and III respectively, with counts II and III to run concurrently with each other and with count I. Baker appeals. Further facts as necessary to the issues raised will be discussed below.

II. Motion for New Trial

A. Factual Background

Three weeks after the jury returned verdicts of guilty, Baker filed a motion for new trial. In relevant part he asserted the jury had been guilty of misconduct tending to prevent a fair and just disposition of the case. *See* Iowa R. Crim. P. 23(2)(b)(3). More specifically, as shown by the record made at a subsequent hearing on the motion, Baker claimed the misconduct was what he characterized as a "threat" made by one juror, Zars, toward another juror, Ray.

An element of kidnapping in the first degree the State was required to prove was that as a consequence of kidnapping the victim, Baker subjected her to sexual abuse. *See* Iowa Code § 710.2 (1997). To prove sexual abuse the State had to prove Baker performed a sex act with the victim by force or against her will. *See* Iowa Code § 709.1(1) (1997). At the hearing on the motion for new trial Baker attempted to introduce testimony of juror Ray concerning the "threat" made by juror Zars. The State objected, on the basis such testimony concerned matters that "inhere in the verdict" and are thus improper under "Rule 606." *See*

Iowa R. Evid. 606(b). The court sustained the State's objection, but made a full record, in the form of an offer of proof, through the testimony of juror Ray, juror Zars and other jurors.

The case was submitted to the jury at 11:28 a.m. The testimony at the hearing on the motion for new trial shows that at about 3:30 to 4:00 p.m. on the day of submission the jury was discussing the kidnapping charge. Juror Ray, and perhaps other jurors, apparently were taking the position that because the victim had said "yes" after Baker forced her to the bar floor and made a second request for sex, the victim had consented to Baker's request, therefore the ensuring sex acts were not performed by force or against her will, and therefore Baker was not guilty of kidnapping in the first degree. Juror Zars and other jurors apparently felt strongly that the victim's "yes" was coerced by being choked and threatened with death, therefore was not in fact consent, and that the sex acts were therefore performed by force or against her will.

Juror Ray testified juror Zars said something like, "If you don't hurry up and agree, I'm about ready to come over there and choke you just like he did her." Juror Zars testified she asked, "If she [apparently referring to juror Ray] was in the same circumstances as somebody choking her, how would she feel," and then sat back in her chair and said, "I'm about ready to give it a try." The other jurors who testified agreed that juror Zars had made a statement similar to that testified to by jurors Ray and Zars. All the jurors who testified agreed that Zars had apologized to Ray, some stating she had apologized on two or more occasions, and all but Ray stating the first apology occurred very shortly after Zars had made the comments characterized by Baker as a "threat." All jurors

who testified agreed that after the alleged "threat" was made, Ray continued to participate in the deliberations and continued to debate the issues and her views. Juror Ray ultimately joined the other eleven jurors in returning a unanimous verdict at 11:32 a.m. the next day.

After rendering its verdicts, the jury was polled, and all jurors affirmed the verdicts. Juror Ray testified at the hearing on the motion for new trial:

> I was debating the entire time they were polling the jury whether I should stand up and say no and I thought afterwards I would talk to the judge about it. I didn't realize that it would get involved but I– my [conscience] felt that someone should. It should be discussed.

Following the hearing on the motion for new trial, the court denied the motion, holding rule 606(b) precluded consideration of the proffered evidence. The court then discussed the merits of the claim and stated that if Rule of Evidence 606(b) did not preclude consideration of the jurors' testimony, it appeared clear the statement did not influence the verdict. The court stated in conclusion, "Defendant has not shown jury misconduct warranting impeachment of the verdicts. . . ."

On appeal, Baker claims the trial court erred in (1) refusing to consider the evidence; and (2) finding the proffered evidence, even if considered, would not have entitled him to a new trial.

B. Scope and Standard of Review

A trial court has a broad discretion in ruling on motions for new trial based on jury misconduct. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). An abuse of discretion is found only when "'the action of the trial court is clearly unreasonable under the attendant circumstances.'" *Id.* (quoting *State v. Harrington*, 349 N.W.2d 758, 761 (Iowa 1984)). We do not find an abuse of

discretion unless such discretion was exercised on grounds or to an extent clearly unreasonable. *State v. Johnson*, 445 N.W.2d 337, 340 (Iowa 1989).

C. Merits of Baker's Appeal

> [T]o impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) 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; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Cullen, 357 N.W.2d at 27.

The first element of the *Cullen* test is governed by Iowa Rule of Evidence 606(b). *Johnson*, 445 N.W.2d at 341. That rule provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Iowa R. Evid. 606(b) (emphasis added); *see also Lund v. McEnereny*, 495 N.W.2d 730, 733 (Iowa 1993) ("In Iowa, ... juror affidavits may be used to impeach a verdict if *external* pressures affected that verdict, but may not use such affidavits to impeach a verdict based on *internal* workings of a jury." (emphasis in original)).

This rule renders jurors "incompetent to testify to any matter or statements occurring in the course of deliberations . . . including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other

feature of the process occurring in the jury room." *Ryan v. Ameson*, 422 N.W.2d 491, 495 (Iowa 1988). Thus, even though the discussions that take place in the jury room are "frequently heated and sometimes offensive," such matters "are said to inhere in the verdict and cannot be used to impeach it." *State v. Smith*, 240 N.W.2d 693, 696 (Iowa 1976).

In accordance with these principles, our supreme court has held jurors cannot impeach their own verdict with evidence that some of them "were 'brow beaten' by the other jurors and denied a fair chance to express their opinions," *State v. Folck*, 325 N.W.2d 368, 373 (Iowa 1982), or with evidence that a juror "was unduly influenced by the statements of fellow jurors," *State v. Berch*, 222 N.W.2d 741, 748 (Iowa 1974); *State v. Washington*, 160 N.W.2d 337, 340 (Iowa 1968); *State v. Brown*, 253 Iowa 658, 671, 113 N.W.2d 286, 294 (1962). Similarly, federal courts interpreting Federal Rule of Evidence 606(b), which is identical to the Iowa rule, have held that jurors are not competent to impeach their verdict with "proof of contentiousness and conflict" among the jurors, *United States v. Tallman*, 952 F.2d 164, 167 (8th Cir. 1991), or with evidence of "harassment or intimidation of one juror by another," *United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989), or with evidence that one juror was "pressured" by other jurors, *United States v. Lamp*, 779 F.2d 1088, 1097-1098 (5th Cir. 1986), or with evidence that the foreman of the jury had threatened to report one juror to the judge and thereby "scared [her] to death," and that another juror had second thoughts about the verdict, *United States v. Barber*, 668 F.2d 778, 786-87 (4th Cir. 1982).

Baker argues, even in light of the clear case-law cited above, that a threat is more than pressure, and cites Professor Weinstein, who says "Rule 606(b) would not render a witness incompetent to testify to juror irregularities such as exposure to threats...." 3 J. Weinstein, Weinstein's Federal Evidence, § 606.04[4][a] (2d ed. 1999). All the cases Professor Weinstein cites in support of this proposition deal with threats coming from non-jurors. Baker recognizes this difference, but nonetheless argues public policy demands that no threat, from wherever the source, should be excluded from the district court's examination because of rule 606(b). Rather, he contends the cause should be remanded to the district court for a hearing pursuant to Iowa Rule of Criminal Procedure 23(2)(b)(4), which allows for the granting of a new trial "[w]hen the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all jurors." Iowa R. Crim. P. 23(2)(b)(4).

As a preliminary matter we note any reliance on Rule of Criminal Procedure 23(2)(b)(4) is misplaced. This is because Baker's motion for new trial specifically relied on the grounds set forth in rule 23(2)(b)(3) and rule 23(2)(b)(2), not on the grounds set forth in rule 23(2)(b)(4), and this part of his appeal is based on the trial court's ruling concerning rule 23(2)(b)(3). Therefore, no error has been preserved concerning any claim based on rule 23(2)(b)(4). We will nevertheless address this argument, as if it related to Baker's claim of error concerning rule 23(2)(b)(3).

Although Baker argues that for public policy reasons no threat should be excluded from the district court's examination because of rule 606(b), he identifies no public policy that supports his position. We believe the public policy

that underlies rule 606(b) demands we reject his argument. The rationale supporting the rule 606(b) prohibition against juror testimony concerning the jury's internal deliberative process has been described in the following manner:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

Ryan, 422 N.W.2d at 493-94 (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68, 35 S. Ct. 783, 784, 59 L. Ed. 1300, 1302 (1915)). Our courts have also noted that rule 606(b) serves the important purpose of halting endless litigation. *See State v. Folck*, 325 N.W.2d 368, 372 (Iowa 1982), and cases cited therein. "[I]f we allow such attacks by individual members on the composite verdict of all twelve we can expect an unsettling of the system out of all proportion to any expectable improvement in the administration of justice." *Barber*, 668 F.2d at 786. To allow the proposed inquiry into the internal workings and deliberations of the jury would severely breach the insulation of the jury room and detract from the finality of judgments. We agree with the district court that the evidence offered in support of the motion for new trial was inadmissible. We also agree with the district court that even if the proposed evidence were considered, the evidence clearly demonstrates the statement in question did not influence the verdicts because deliberation and debate continued for several hours before

verdicts were reached. We therefore affirm the district court's denial of Baker's motion for new trial.

III. Ineffective Assistance of Counsel Claims

To establish an ineffective assistance of counsel claim, the applicant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). Such claims are usually reserved for postconviction relief actions in order to give defense counsel an opportunity to respond to the allegation counsel failed to perform an essential duty. *State v. Laffey*, 600 N.W.2d 57, 60-61 (Iowa 1999).

The record before us is inadequate to determine whether there were strategic reasons trial counsel 1) did not further develop the record concerning a newspaper article read by a juror or jurors; 2) did not move for a change of venue; and 3) did not call Baker to testify in his own defense. Baker requests these claims be preserved for a postconviction relief proceeding, and the State indicates this Court should do so. We therefore preserve these three claims of ineffective assistance of counsel for a possible postconviction relief proceeding.

AFFIRMED.