IN THE COURT OF APPEALS OF IOWA

FILED
JAN 28 1987
CLERK SUPREME COURT

204

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 28, 1987
vs.	)	
SCOTT DeMARCO NEWMAN,	)	6-359 85-1216
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 27949) - James P. Denato, Judge.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of first degree burglary in violation of Iowa code section 713.2, contending that the record contained insufficient evidence to support his conviction and that the trial court erred in overruling his motion for a new trial based upon alleged juror misconduct. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Ronald L. Wheeler, Assistant Polk County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell and Schlegel, JJ.

OXBERGER, C.J.

Defendant Scott De Marco Newman appeals from the jury verdict finding him guilty of first degree burglary in violation of Iowa Code section 713.2 (1985). Newman maintains that the State's evidence was insufficient to sustain his conviction. In addition, he asserts that the trial court abused its discretion in refusing to grant a new trial because of claimed jury misconduct. We reject both of these contentions and affirm.

I. SUFFICIENCY OF THE EVIDENCE

At the close of the State's case, the defendant moved for a judgment of acquittal on the ground that the State had presented insufficient evidence to sustain his conviction; the motion was overruled. On appeal, the defendant argues that the record lacks substantial evidence to support the jury's verdict.

When examining a claim of the alleged insufficiency of evidence, we view the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). In addition, we accept all legitimate inferences which may fairly and reasonably be deduced from the record. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). Moreover, we consider all of the evidence, not only that supporting the jury's verdict. Id. A jury's verdict is binding upon appeal unless it is not supported by substantial record evidence. State v. Schrier, 300 N.W.2d at 306. "Substantial evidence" is evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

The record discloses that on November 10, 1984, at approximately 11:15 p.m., three masked individuals broke into the Charles Daniels' home. One of the intruders held Charles, his wife Velma, and their son Walter at gunpoint while the other two ransacked the house. The burglars took $280 in cash and a turquoise ring. None of the Daniels were able to identify the perpetrators

because they were dressed in what Mrs. Daniels described as "space clothes" and their faces were covered by ski masks.

When the police arrived at the scene, they gathered two pepsi bottles, two wine bottles, and a coke bottle which had been left sitting out. Walter Daniels testified that during the burglary, he heard the intruders getting something from the refrigerator. Daniels further stated that the bottles had not been left out prior to the burglary. Several fingerprints were lifted from the bottles and John Kilgore, an identification technician for the Des Moines Police Department, positively identified one of the fingerprints as the defendant's. Kilgore testified that he found eight specific similarities between the print left on the bottle and a known print of the defendant's; there were no inconsistencies between the two prints. On the basis of this evidence, the defendant was convicted.

The defendant argues that the evidence is insufficient to support a finding of his guilt beyond a reasonable doubt. First, he maintains that the jury's verdict is inconsistent with the evidence because, after the burglary, the Daniels told the police that they thought the perpetrators were three white men; the defendant is black. It is significant, however, that each of the Daniels specifically testified that they were unable to observe the burglars because they were completely disguised. In addition, Walter Daniels stated that although the only light was from the television, he thought that at least one of the burglars was wearing gloves because he saw that his hands were dark. In these circumstances, we cannot say that the verdict is inconsistent with the evidence. Moreover, an alleged inconsistency in identification testimony goes to the weight of the testimony and the credibility of the witness, which are matters resting in the province of the jury. See State v. Graham, 291 N.W. 345, 350 (Iowa 1980); see also Foster v. State, 378 N.W.2d 713, 718 (Iowa Ct. App.

1985). Most importantly, however, the unchallenged evidence of the defendant's fingerprint substantiates the jury's finding that he was a participant in the crime. See State v. Sellers, 215 N.W.2d 231, 232 (Iowa 1974) ("The question of whether evidence of fingerprints, standing alone, is sufficient to sustain a conviction will depend on the facts of each given case.").

The defendant additionally argues that his conviction cannot stand because it is predicated solely upon circumstantial evidence. It is well recognized, however, that circumstantial evidence is not inferior to direct evidence, and is considered equally probative. State v. Blair, 347 N.W.2d at 421. Whether the State's evidence is direct or circumstantial, it must raise a fair inference of guilt rather than simply creating speculation, suspicion, or conjecture. Id.; State v. Schrier, 300 N.W.2d at 308. We think that the evidence adduced in the present case surpasses this requirement. Viewing the evidence in the light most favorable to the verdict, a fair inference that the defendant was a perpetrator of the burglary is established. This inference exceeds mere speculation, suspicion, or conjecture. Accordingly, we hold that the trial court did not err in overruling the defendant's motion for a judgment of acquittal.

II. JURY MISCONDUCT

After the jury returned its verdict, the defendant filed a motion for a new trial in which he alleged that during the trial, at least six jurors had obtained extraneous information regarding his arrest in an unrelated murder charge. The defendant argues that the jurors' receipt of such information was grossly prejudicial and denied him a fair trial by an impartial jury. The trial court denied the motion, which the defendant contends constituted an abuse of discretion.

It is well settled that a trial court is vested with broad discretion in ruling upon a motion for a new trial based upon alleged juror misconduct.

State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983). An abuse of discretion is found only when "the action of the trial court is clearly unreasonable under the attendant circumstances." State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984).

In State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984), the supreme court set forth the following principles governing an allegation that a new trial is warranted because of alleged juror misconduct:

> [In order] to 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.

Id.; see also State v. Folck, 325 N.W.2d 368.372 (Iowa 1982).

The only evidence presented by the defendant in support of his contention that the verdict was improperly influenced is the fact that six jurors were aware of the murder charge which had been filed against him. The defendant maintains that because one of the jurors testified that the pending charge was alluded to during deliberations, it necessarily bore upon the verdict.[1] We think that this bare assertion falls short of the required showing imposed by the supreme court in Cullen. Initially, we note that it is unclear whether the murder charge was in fact mentioned during the jury's deliberation; another

---

[1]The juror testified as follows:

BY THE COURT:

Q: During any time during deliberations did you hear from any juror. . . that Mr. Newman also had an outstanding charge of. . . murder. . . against him?

A: It was during deliberations; not that murder was involved, it was just that there were other changes pending.

juror testified that the mention was not made until after the verdict had been reached. Moreover, we find guidance in the supreme court's recent decision in State v. Harrington, 349 N.W.2d 758 (Iowa 1984). There, the record disclosed that during deliberations, one of the jurors mentioned that on a previous occasion, the defendant had been arrested for shooting his brother. The supreme court held that, where the only evidence offered by the defendant was the fact that the prior shooting had been mentioned, the allegation of misconduct could not stand because "there was no hint of the context or extent of the discussion." Id. Similarly, no such showing has been made in the present case; on the contrary, the testimony of the jurors explicitly indicates that the pending charge was no more than mentioned. In these circumstances, we do not think that the tolerable bounds of deliberation have been exceeded or that the alleged misconduct was "calculated to, [or] with reasonable probability did influence the verdict."[2] State v. Cullen, 357 N.W.2d at 27-28. Accordingly, we hold that the trial court did not abuse its discretion in denying the defendant's motion for a new trial.

AFFIRMED.

---

[2]Inherent in the defendant's allegation of juror misconduct is his contention that the jurors should have disclosed their knowledge of the pending charge to the court. We have found no support for this assertion. The trial court explicitly noted that the jurors had not been admonished to report the receipt of such information. Moreover, although the supreme court has addressed a number of cases concerning jurors' receipt of extraneous information, the court has never mentioned any such requirement of disclosure. See, e.g., State v. Harrington, 349 N.W.2d 758 (Iowa 1984); State v. Cullen, 357 N.W.2d 24 (Iowa 1984); State v. Christianson, 337 N.W.2d 502 (Iowa 1983); State v. Jackson, 195 N.W.2d 687 (Iowa 1972). Consequently, we conclude that this contention is without merit.