

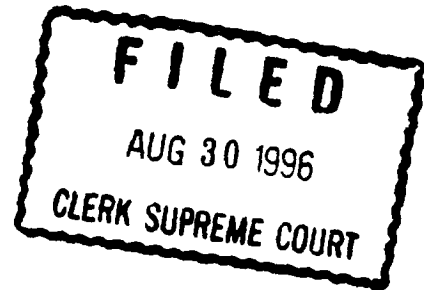
**IN THE COURT OF APPEALS OF IOWA**

No. 6-320 / 95-1168

**STATE OF IOWA,**  
Appellee,

vs.

**JAY FRED COTTRELL,**  
Appellant.



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Appeal from the Iowa District Court for Cerro Gordo County, Carolynn D. Grupp. District Associate Judge.

Jay Cottrell appeals the judgment and sentence entered upon his convictions of operating a motor vehicle while barred and operating a motor vehicle while revoked or suspended in violation of Iowa Code sections 321.561 and 321J.21 (1993).

**AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Paul L. Martin, County Attorney, and Kathleen Selzler, Assistant County Attorney, for appellee.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

**VOGEL, J.**

On March 3, 1995 Jay Cottrell was charged by trial information with operating a motor vehicle while barred and operating a motor vehicle while license had been denied or revoked in violation of Iowa Code sections 321.561 and 321J.21 (1993).

At the beginning of Cottrell's jury trial the district associate judge asked counsel whether they desired to be present when communications from the jury came before the court. Both counsel agreed they did not need to be present if the communication simply called for a response that the jury review the instructions already received. Cottrell's counsel further stated, "If it's a minor deal that doesn't call for decision making on the part of the defense counsel, go ahead and do it." The court answered that if the communication was substantive, it would contact counsel.

At trial Cynthia Sanders testified she operates the Ashley Inn in Mason City. Cottrell had rented and paid for a room at the Ashley Inn for a week. On February 22, 1994, a lock was put on Cottrell's room after he had fallen a week behind in paying his rent. At approximately 8:00 p.m. on February 22, Sanders observed Cottrell driving into the Ashley Inn's driveway and parking in front of his room. She saw him emerge from the driver's side of the car, walk to his room door, and attempt to open it. Sanders testified Cottrell then approached her in the office and asked for an explanation. After explaining the situation to Cottrell, Cottrell stated he was going to remove the lock. Sanders then called the police.

Victor Calhoun testified he had been working with Cottrell on February 22. He stated that after they finished work he drove Cottrell to the Ashley Inn in Cottrell's car. Calhoun then drove away in his girlfriend's car which was parked at the Ashley Inn. He remembered it was snowing and dark that evening. Calhoun stated that both he and Cottrell were wearing baseball hats and similar clothing and had full beards at the time.

Cottrell testified Calhoun was driving his car when he returned to the Ashley Inn on February 22. He further stated they were dressed alike and both had beards.

The jury sent the district court judge three notes during deliberations. Two of these notes resulted in supplemental instructions being issued to the jury. The supplemental instructions directed the jury to review specific instructions and continue their deliberations. The jury returned a verdict finding Cottrell guilty of operating a motor vehicle while barred. Pursuant to Cottrell's stipulation and the jury's finding, a guilty verdict was entered against Cottrell on the charge of operating while denied or revoked.

Cottrell filed a motion for new trial alleging juror misconduct. At the hearing on the motion jurors Penny Loers and Leon Adreon testified. Loers testified that during deliberations the jury learned from Adreon that Cottrell had just gotten out of prison and that he was the neighborhood terror. She further stated she was not influenced by these remarks.

Adreon testified that during voir dire he had been asked if he knew Cottrell and had answered yes, “[h]e grew up across the street from me.” Adreon stated he had told the jury Cottrell had been in prison and that he had raised a lot of fuss in the neighborhood. He thought he was a fair juror in this case and voted for convicting Cottrell based on finding he had been driving on February 22.

The district court denied the new trial motion finding Cottrell had failed to show the alleged misconduct was calculated to and with reasonable probability did influence the verdict.

Cottrell appeals.

**I. Jury Misconduct.** Cottrell contends the district court erred in denying his motion for a new trial based on an allegation of jury misconduct. Cottrell argues the jury misconduct occurred during deliberations when one of the jurors, Leon Adreon, shared information regarding Cottrell which was not admitted into evidence.

The district court has broad discretion in ruling on motions for a new trial based on allegations of jury misconduct. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). An abuse of discretion is not found unless the ruling by the district court was clearly unreasonable. *Id.*

The district court may grant a new trial when, among other grounds, the jury “received any evidence, paper or document out of court not authorized by the court.” Iowa R. Crim. P. 23(2)(b)(2). In order to receive a new trial based on jury misconduct, three conditions must be met. *State v. Johnson*, 445 N.W.2d 337, 341

(Iowa 1989). First, there must be competent evidence bearing on the misconduct. *Id.* Second, the misconduct must exceed the tolerable bounds of jury deliberation. *Id.* Finally, the misconduct must have been “calculated to, and with reasonable probability did, influence the verdict.” *Id.* If one of these three prongs is not met, then we must find there was no abuse of discretion. We need not make any determinations on the first two prongs since we find the misconduct on the part of Adreon was not prejudicial.

The third prong is a measure whether the alleged misconduct was prejudicial. *State v. Tinnus*, 527 N.W.2d 414, 417 (Iowa App. 1994). In determining whether the misconduct influenced the verdict, we must examine the claim in light of all the evidence, including the demeanor of witnesses, and issues presented. *Johnson*, 445 N.W.2d at 342. The impact of the misconduct is examined objectively to determine whether the extraneous information would prejudice a typical juror. *State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996); *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991). We must determine whether the extraneous information would more likely than not implant prejudice of an indelible nature upon the mind. *Henning*, 545 N.W.2d at 325; *State v. Mayberry*, 411 N.W.2d 677, 685 (Iowa 1987). An examination of prior cases shows the prejudice prong is not easily satisfied. *Johnson*, 445 N.W.2d at 342; *Tinnus*, 527 N.W.2d at 417.

In *State v. Henning*, the jurors received information regarding the defendant’s three prior Operating While Intoxicated (OWI) convictions during the course of his

trial for OWI. *Henning*, 545 N.W.2d at 324. The court stated that such information, “went beyond” merely advising the jurors that defendant had been guilty of bad acts . . . . It demonstrated that he was a habitual operator of a motor vehicle while under the influence of intoxicants.” *Id.* at 325. In the current case, the jurors received information that Mr. Cottrell had been in prison and was the neighborhood terror. These comments were clearly information beyond the testimony but were merely comments on prior bad acts, not information regarding the same allegations for which he was currently being tried. The jury chose to and did ignore the information.

The only true issue at trial was whether Cottrell was driving the car on the evening of February 22, 1994. None of the extraneous information volunteered during deliberations dealt with the issue of the identity of the driver on the night in question. Adreon did not provide any information on whether he had ever witnessed Cottrell driving without a license or driving while under the influence. We conclude there is not a reasonable probability the extraneous information influenced the verdict. Thus, the district court did not abuse its discretion in denying the motion for a new trial.

**II. *Ineffective Assistance of Trial Counsel.*** Cottrell contends his trial counsel provided ineffective assistance. Specifically, Cottrell argues defense counsel erred by conditionally waiving his presence and input to jury communications. Cottrell

argues defense counsel would have been prompted to request a mistrial if he had been present during the communications.

In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 430 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 430 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one

of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

The jury retired to deliberate at 2:50 p.m. on May 18, 1995. It sent the court three notes during its deliberations. The first note was received at 4:35 p.m. on May 18 and read "We are at an impasse and see no way to come to an agreement. We voted 3 times and can not agree." The court responded, in pertinent part: "Reread instruction No. 11 and continue your deliberations." At 5:21 p.m. on May 18, the jury sent a second note to the court stating: "We will be back tomorrow, but see no way to come to agreement. Case was not clear enough." The jury resumed deliberations at 9:00 a.m. on May 19. At 9:30 a.m., the court received a third note from the jury asking: "Can you tell us what 'on or about' or if we have to stick to just this day?" The court replied: "You are bound by the date set forth in Instruction No. 4 which is February 22, 1993. Review that instruction and continue your deliberations." A verdict was returned at approximately 10:00 a.m.

We discourage the grant of a mistrial after only a short period of deliberation. *State v. Chadwick*, 328 N.W.2d 913, 918 (Iowa 1983); *State v. Montes*, 445 N.W.2d 407, 407 (Iowa App. 1989); *Foster v. State*, 378 N.W.2d 713, 720 (Iowa App. 1985). The jury in this case only used approximately three and one-half hours to deliberate. We find there is not a reasonable probability that, but for counsel's alleged error, a motion for mistrial based on a deadlocked jury would have been successful. We

likewise find the circumstances in this case do not suggest a motion for mistrial would have been successful. We conclude Cottrell's claim must fail on direct appeal.

Accordingly, we affirm the Cottrell's convictions.

**AFFIRMED.**