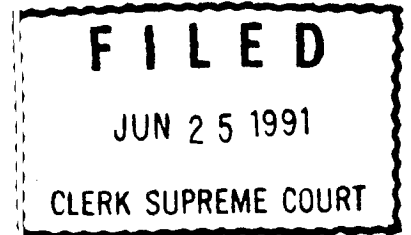


IN THE COURT OF APPEALS OF IOWA

No. 1-199 / 90-315



STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT DAVID JOHNSTON,

Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County,
Ray Hanrahan, Judge.

Johnston appeals from his conviction, following a jury
trial, for second-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Andi S.
Lipman, Assistant State Appellate Defender, and Robert D.
Johnston, pro se, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes,
Assistant Attorney General, John P. Sarcone, County
Attorney, and D. William Thomas and Nan Horvat, Assistant
County Attorneys, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant-appellant Robert David Johnston appeals following his conviction for second-degree murder. He contends he should have a new trial because of (1) jury misconduct, and (2) ineffectiveness of his trial counsel. He also contends the charge should be dismissed because there is insufficient evidence to support his conviction. We affirm.

Defendant was charged with killing Roderick Everett. From the evidence the jury could have found defendant was a passenger in a car driven by his wife. The car stopped at the corner of Seventh and Washington in Des Moines. Defendant had a conversation with the victim and the victim's common law wife. Defendant subsequently drew a gun and shot the victim. After the shooting, defendant's wife drove off. The car was stopped a few minutes later on a river bridge. No gun was found. Gunpowder residue was found on the hands of defendant, defendant's wife, and the victim's common law wife.

I.

The jury had been instructed not to visit the crime scene. During lengthy jury deliberations, defendant and his attorney learned a juror may have visited the scene. The information came from a juror on the panel but not serving on the case. After the verdict, the trial court separately questioned the juror alleged to have visited the scene, and the jury foreman.

Defendant filed a motion for new trial. His motion was supported by the testimony of a juror who got the impression the other juror was in the area of the crime scene.

The trial court found no juror had visited the scene. There is substantial evidence to support this finding. We give deference to the trial court's factual finding. We agree with the trial court there is insufficient evidence to support a finding a juror went to the crime scene. See State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983).

II.

Defendant next contends his trial counsel was ineffective, in that he failed to figure the time and speed ratio of the car defendant's wife was driving. Defendant has not shown what the testimony would have been or how it would have changed the result at trial. Defendant also contends his trial counsel was ineffective in allowing false testimony by a police officer on the speed of the car. Defendant has not shown the testimony was false or if it were admitted the result at trial would have been different. Defendant has failed to carry his burden on this issue. See Strickland v. Washington, 446 U.S. 668, 690-91, 104 S. Ct. 2052, 2066, 80 L. Ed. 674, 696 (1984).

II.

Defendant's last contention is there is not substantial evidence to support a finding of guilt. An officer

observed the car defendant was riding in speeding near the crime scene. The officer ultimately stopped the car on a nearby bridge. Persons at the crime scene identified a car meeting the description of the one in which defendant was riding. The victim's common law wife testified she saw the victim shot and defendant did the shooting. She later identified the defendant as the one doing the shooting. There was powder residue on defendant's hands. There is substantial evidence to support the conviction.

AFFIRMED.