FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA)
Appellee,) Filed March 29, 1978
vs.)
DANIEL DARIO LILLI,) 408 / 60114
Appellant.)

Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Trial court denied defendant's motion for new trial based on jury misconduct in reading from dictionary and the Bible which were not in evidence. - Affirmed.

Lowell H. Forte, Cedar Rapids, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Jack W. Dooley, Johnson County Attorney, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Daniel Dario Lilli appeals his conviction by jury of the crime of delivery of a controlled substance, L.S.D., in violation of § 204.401(1), The Code. After the initial jury found defendant guilty, defendant asked for and received an accommodation hearing pursuant to § 204.410, The Code. This same jury was unable to reach a verdict on the accommodation issue and was ultimately declared hung and dismissed by the trial court. A new jury was impaneled and the issue of accommodation or profit was again submitted. The second jury found defendant guilty of delivery with intent to profit and not as an accommodation. On appeal, defendant alleges the trial court erred in overruling his motion for new trial based on alleged juror misconduct.

The trial court has broad discretion in determining whether evidence of claimed jury misconduct justifies a new trial. State v. Houston, 209 N.W.2d 42, 44 (Iowa 1973); State v. Jackson, 195 N.W.2d 687, 690 (Iowa 1972). See also State v. Feddersen, 230 N.W.2d 510, 514 (Iowa 1975); State v. White, 223 N.W.2d 173, 177 (Iowa 1974). This same rule applies in civil cases as well as criminal. In re Estate of Cory, 169 N.W.2d 837, 845 (Iowa 1969); Townsend v. Mid-America Pipeline Co., 168 N.W.2d 30, 36 (Iowa 1969). However, the trial court's holding will not be set aside on appeal except upon a showing of abuse of such discretion. Fleener v. Board of Supervisors, 246 N.W.2d 335, 338 (Iowa 1976); Feddersen, supra; Houston, supra; Cory, supra; Townsend, supra; State v. Little, 164 N.W.2d 81, 83 (Iowa 1969).

To justify a new trial for jury misconduct in a criminal case, it must appear the misconduct was calculated to, and probably did, influence the verdict. Houston, supra. See also Fleener v. Board of Supervisors, supra. The statutory provisions are contained in chapter 787, The Code. The overriding concern is whether defendant was deprived of a fair trial because of the misconduct of the jury. State v. Little, supra. In civil cases not only must it be shown the misconduct was calculated to, and it is reasonably probable that it did, influence the verdict, but it also must be shown that the misconduct materially affected substantial rights of the aggrieved party or prevented the movant from having a fair trial. Cory, supra; Rule 244, Rules of Civil Procedure. Cf. Fleener, supra.

In the instant case, defendant complains of two acts of misconduct which he argues justifies a new trial. The first involved one of the juror's unauthorized use of a dictionary in an attempt to define the word "principal" as used in the court's instructions. Much of the first day and a half of jury deliberations centered on the meaning of the word "principal" and whether there could be more than one principal for whom defendant was acting and who that principal might be. The jury recessed on Tuesday evening with the vote eight to four in favor of acquittal.

On Wednesday morning one of the jurors announced she had changed her mind and that she wanted to read a statement she had found the night before in Webster's Dictionary. She then proceeded to read the three common dictionary definitions of the word "principal". The next ballot of the jurors showed a change from the previous night's vote of eight to four in favor of defendant to eight to four in favor of the State. Wednesday evening ended with the jury voting nine to three in favor of finding defendant guilty of delivery with intent to profit.

Wednesday evening another one of the jurors consulted her Bible, as was her practice when she had a difficult decision to make. The next morning she received permission from the bailiff and brought it into the jury room. She took a place near the head of the table and was given one of the first opportunities to speak. The juror then read several passages from "The Living Bible." One passage stated parents should not fail to correct their children and that discipline will not hurt them but they should rescue those who are unjustly sentenced. She then read another passage dealing with mercy and asked the other jurors whether there was an element that they could have mercy in the case. A discussion then followed as to whether any of the passages should be taken into account in deciding the facts. One juror testified the jury decided they should not be. The next unofficial ballot was 10 to two in favor of finding defendant guilty.

In In re Estate of Cory, 169 N.W.2d 837, 845-46 (Iowa 1969), the supreme court held, with four justices dissenting, the unauthorized use of a dictionary to define the words "undue" and "undue influence" was not prejudicial jury misconduct and would not support a holding that the trial court abused its discretion in refusing to grant a new trial. The court stated "the definitions of words in our standard

dictionaries is taken as a matter of common knowledge which the jury is supposed to possess." 169 N.W.2d at 846. See also Fagen Elevator v. Pfiester, 244 Iowa 633, 642, 56 N.W.2d 577, 582 (1953) (unauthorized use of 'The Iowa Drivers Guide' manual).

The use of dictionaries by juries has also been held not to require the granting of a new trial in other jurisdictions as well. 66 C.J.S. New Trial § 58d(1) at 182; 58 Am. Jur. 2d New Trial § 92 at 288-9. See also 54 A.L.R.2d 738. The definitions of the word "principal" were not in conflict with the meaning of or any definitions contained in the court's instructions. From a review of the record, we hold the trial court did not abuse its discretion in overruling defendant's request for a new trial. See Harris v. Deere & Co., # 60075, filed March 22, 1978.

The second claim of misconduct concerns the unauthorized use of the Bible. Defendant alleges that the Bible is a lawbook and attempts to establish this through defense counsel's examination of the juror during the hearing on his motion for new trial. As such, defendant argues the same rules should apply as in State v. Kirk, 168 Iowa 244, 150 N.W. 91 (1914), to the unauthorized use of the Iowa Code. In Kirk, the supreme court held a new trial was mandated where the jury consulted the Code for the penalty for manslaughter and failed to take into account the indeterminate sentencing law.

Although the use of the Bible was improper and constituted misconduct, to justify a new trial it must appear the misconduct was calculated to and probably did influence the verdict. Houston, supra. It must also appear that prejudice resulted therefrom and that defendant was thereby prevented from having a fair trial. Little, supra. The trial court found there was no probability the references to the dictionary or the Bible influenced the verdict or prevented defendant from having a fair trial. It does not clearly appear this was an abuse of discretion. Harris v. Deere & Co., # 60075, filed March 22, 1978; Feddersen, supra.

AFFIRMED.

All judges concur, except Donielson, J., who concurs specially.

DONIELSON, J. (specially concurring)

Although I agree with the majority opinion, I wish to note with respect to the presence of the Bible in the jury room, that, in my view, the issue turns not so much upon the impact of the mere presence of the Bible itself as upon the ideas expressed in the passages which were read to the jury. I see no difference between the situation in which a juror, without the aid of a Bible, quotes from memory, albeit possibly erroneously, certain passages therefrom and the juror in this case who read several passages from the Bible. In both instances, we must focus our attention upon the content of the ideas expressed.

It appears from the record that some passages were read which would lend support to the conviction of the defendant and others were read which would support his acquittal. After a discussion among the jurors as to whether any of the passages should be taken into account in deciding the case, one juror testified that the jury decided that the passages should not be considered. Consequently, I am unable to conclude that defendant was denied a fair trial because of the misconduct of the jury.