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NOV 22 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed November 22, 1978
Appellee,	)	
v.	)	673 60726
LARRY LEE AGEE,	)	
Appellant.	)	

Appeal from the Polk District Court - Thomas S. Bown, Judge.

Defendant appeals from judgment imposed upon convictions of robbery with aggravation and being an habitual criminal claiming bailiff misconduct prejudiced the verdict. Reversed and remanded on both convictions.

Gerald W. Crawford, of Conley, Conley & Crawford, of Des Moines, for appellant.

Richard C. Turner, Attorney General, and Dan L. Johnston, Polk County Attorney, for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant, Larry Lee Agee, appeals the denial of his motion for new trial following convictions of robbery with aggravation, § 711.2, The Code 1975, and being an habitual criminal, § 747.1, The Code 1975. The sole claim on appeal is that statements made by a substitute bailiff to jurors during deliberations constitute prejudicial misconduct requiring a new trial.

Testimony taken and considered at the hearing on the issue reveals the jury had deliberated for three days. During that period the jurors twice sent notes to the trial judge informing him they were deadlocked. On each occasion notes were returned to the jury from the trial judge reading "deliberate more." These notes were delivered by the bailiff. Judge Bown, who presided during the trial, reported at the new trial hearing that after the second note had been returned to the jury he had a court assignment elsewhere in the judicial district and Judge Holliday agreed to await the verdict. Judge Bown reported the two judges discussed the giving of an Allen charge if the jury continued to be deadlocked. Thereafter, Judge Holliday received a note from the jurors indicating that they were still deadlocked. He replied stating that he would call a conference of the lawyers. The jury then discontinued its deliberations but remained in the jury room. About two hours later a different bailiff came to the jury room and asked "how are you doing?" When the jurors responded that they were not talking about the case, that they were waiting to hear from the judge, the bailiff said "He is not going to get to you for a long, long time." The bailiff then turned to leave and, smiling, said "If you could get to a verdict quickly, I'm sure he would hear what you have to say right away." The foregoing facts were testified to by one of the jurors who also testified that (a) prior to the bailiff's statement the vote was 11-1 for a guilty verdict; and (b) within ten minutes of the bailiff's departure a new ballot of the jurors was taken, without further deliberation, which resulted in a unanimous verdict of guilty. The juror who so testified was the lone dissenting juror and indicated that her change in vote was brought about by the bailiff's statement. The State offered no evidence rebutting that which was testified to by this juror. The trial court denied defendant's new trial motion, accepting the juror's statements as true but ruling that such evidence inhered in the verdict.

In considering misconduct of the type alleged in the present case we are confronted by two well established rules. First, it has consistently been held misconduct with respect to the jury, whether it be by litigant, counsel or officer of the court, will not be grounds for a new trial unless prejudice is shown. State v. Cowman, 212 N.W.2d 420, 425 (Iowa 1973), and citations. Second, the jury process is to be above suspicion and any practice which brings its proceedings under suspicion is to be prohibited. State v. Carey, 165 N.W.2d 27, 29 (Iowa 1969). Trial courts have broad discretion in determining whether evidence of claimed jury misconduct justifies a new trial. State v. Houston, 209 N.W.2d 42, 44 (1973); State v. Jackson, 195 N.W.2d 687 (Iowa 1972).

In the present case trial court correctly determined that the juror's testimony that her "guilty" vote was a response to the bailiff's statements was incompetent. Such testimony is a matter which inheres in the verdict. State v. Brown, 253 Iowa 658, 671, 113 N.W.2d 286, 294 (1962). But this ruling is not dispositive of the larger issue of whether prejudicial misconduct transpired. The juror's testimony regarding the bailiff's words and manner, content of the notes, pauses in deliberations, and status of the vote before and after the bailiff's statements is competent evidence of what occurred in the jury room. See Harris v. Deere & Co., 263 N.W.2d 727, 729-730 (Iowa 1978); Anderson v. Goodyear Tire & Rubber Co., 259 N.W.2d 814, 819-820 (Iowa 1977); Wright v. Illinois and Mississippi Telegraph Co., 20 Iowa 195, 210 (1866).

Officers of the court are not to speak or communicate with jurors on any subject connected with the trial except to ask them if they have agreed upon a verdict, unless by order of the court. See § 780.20, The Code 1975. In State v. Peirce, 178 Iowa 417, 159 N.W. 1050 (1916), the court held a bailiff's communication to the jury in violation of a comparable statute required reversal and grant of a new trial. In Peirce, as in the present case, the bailiff's comments to the jury inferred that there would be a delay in discharging the jury if it did not arrive at a verdict. On balance, the verdict urging implications of the bailiff's remarks in the present case are much more pointed and direct than those involved in Peirce. The jurors had thrice advised the court that they were deadlocked. They were advised that the court was going to confer with counsel (apparently to discuss the alternatives of discharging the jury or giving an Allen charge).

The record indicates that the jury preferred not to deliberate further, awaiting the result of such conference. There is no reason to infer that this would result in any unreasonable delay. But the bailiff's statement strongly suggested that such would be the case and, in addition, was accompanied by language which could only be construed as urging a verdict. We hold the likelihood of prejudice from such happening is sufficiently great to warrant the granting of a new trial. In addition, we conclude that the present case calls for application of the principles stated in Daniels v. Bloomquist, 258 Iowa 301, 306-307, 138 N.W.2d 868, 872:

> "Whether injury or injustice has resulted to the litigants by reason of the conduct, is not our primary concern. Rather our concern is with the implication that attaches to the administration of justice under these circumstances. Confidence in our judicial system is imperiled if such conduct is countenanced in jury trials. Conduct which if proved would give rise to doubt and disrespect, or the mere appearance of such conduct as will not meet with the approval of public opinion, must be severely condemned. It is only through the granting of a new trial in situations like this, as well as vigilant efforts by the officers of the court to prevent such occurrences, that public confidence in the jury system may be preserved."

Defendant's motion for new trial should have been granted as to both convictions.

REVERSED and REMANDED.