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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 31, 1987
vs.	)	
BOBBY RAY BATES,	)	6-525 85-1650
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (No. 41553) - Michael S. Walsh, Judge.

The defendant appeals from his conviction, following a jury trial, of two counts of delivery of a schedule II controlled substance. The defendant contends that he was denied his right to a fair trial by a fair and impartial jury by the prosecutor's failure to timely reveal that the State's key witness and a juror were co-employees. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Dory A. Sutker, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and R. Allen Corzine, Assistant Woodbury County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

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The defendant appeals from his conviction, following a jury trial, of two counts of delivery of cocaine, a schedule II controlled substance. On appeal, the defendant argues that he was denied his right to a fair trial by a fair and impartial jury by the prosecutor's failure to timely reveal that the State's key witness and a juror were co-employees. We affirm.

The defendant, Bobby Bates, was charged by trial information with three counts of delivery of cocaine, a schedule II controlled substance, in violation of Iowa Code section 204.401(1) (1983). During the voir dire of the jury panel, the following colloquy occurred between the prosecution and the prospective jurors:

> MR. CORZINE: Okay. Now everybody in the second group of eight heard the question that I asked to individuals previously. Is there anyone that — that's sparked any ideas in their minds in the sense that they'd answer differently or they would not be able to serve without prejudice to either the State or the defendant in this case?
>
> MS. BONNIE MARTIN: (Raises hand.) I think I know who the undercover agent is, so — so
>
> MR. CORZINE: Okay. Maybe I should say that —
>
> MR. HOLLY BARRON: (Raises hand.)
>
> MR. CORZINE: — the agent for the Division of Criminal Investigation is Timothy Shannon.
>
> MS. BONNIE MARTIN: I don't know him.
>
> MR. CORZINE: The police officers who may be called. Sergeant Charles Noltze, Sergeant Pat Fleming and Officer Nick Schmith.
>
> MS. BONNIE MARTIN: (Shakes head in negative manner.)
>
> MR. CORZINE: Does anyone know those officers?
>
> MR. DOUGLAS BRADSHAW: (Raises hand.)
>
> MR. HOLLY BARRON: (Raises hand.)
>
> MR. CLARENCE HANSON: (Raises hand.)
>
> THE COURT: Please raise your hand, and if you'll keep it up for just a moment.
>
> MR. KEITH MILLER: (Raises hand.)
>
> MR. CORZINE: Sir?
>
> MR. KEITH MILLER: Yes.
>
> MR. CORZINE: Would your acquaintance with any of those officers prevent you from being a fair and impartial juror in this case?
>
> MR. KEITH MILLER: I don't believe so, no.

Defense counsel made no effort to further question juror Keith Miller on any relationship he may have had with Agent Shannon or other police officers. After the jury found the defendant guilty of counts one and two and not guilty of count three, the prosecutor revealed by professional statement that Agent Shannon had informed him during the course of the trial that he was a co-employee of Miller at another part-time job. The prosecutor had failed to disclose this information to either the trial court or the defendant prior to the verdict.

The defendant subsequently filed a motion for a new trial claiming that the State's failure to disclose the relationship between Miller and Agent Shannon denied him a fair trial. The trial court denied the defendant's motion for new trial on the grounds that: (1) there was no juror or prosecutorial misconduct; (2) the defendant made no showing of prejudice; and (3) the defendant's failure to question Miller during voir dire after he stated that he knew one of the officers waived objection on that issue. The trial then rendered judgment and placed the defendant on three years probation.

The defendant's main contention on appeal is that the failure of Miller and the prosecutor to reveal Miller's acquaintanceship with Agent Shannon to the trial court or defense counsel constituted misconduct and that it was error on the part of the trial court to deny his motion for new trial. We disagree.

Concerning jury misconduct, our courts have held that jury misconduct justifies a new trial only if the defendant produces proof, by competent evidence, that the misconduct "was calculated to, and it is reasonably probable that it did, influence the verdict." State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983); State v. Cuevas, 288 N.W.2d 525, 535 (Iowa 1980). Trial courts possess "broad discretion" in deciding whether evidence of alleged jury misconduct warrants a new trial. Christianson, 337 N.W.2d at 504. We will not find an

abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. We apply an objective rather than subjective test in evaluating the alleged misconduct, determining whether a reasonable probability exists that it influenced the verdict. Id. at 506. Our courts have also recognized that the trial court in exercising its discretion could properly examine the misconduct in light of all the evidence offered at trial, the demeanor of the witnesses, and the issues presented before making an evaluation of the impact of the alleged jury misconduct. Id. While a particular juror's bias generally may be shown by words or conduct occurring before the verdict was reached, statements made after the rendition of the verdict could likewise support a finding of bias. Cuevas, 288 N.W.2d at 535. It is, however, well settled that known objections, or those which may have been ascertained, are waived if no challenge is made before the jury is sworn. Id. at 534.

We apply a similar standard to defendant's claim of prosecutorial misconduct. Prosecutorial misconduct entitles a defendant to a new trial only when it appears to have been so prejudicial as to deprive the defendant of a fair trial. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). We will intervene only if the trial court abuses the broad discretion it has to determine whether prejudice results. State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). When claiming prosecutorial misconduct on appeal, the defendant must be able to point to some unfairness which resulted in prejudice. Chadwick, 328 N.W.2d at 916.

Applying the foregoing analysis to the present case, we can find no juror or prosecutorial misconduct which might have unfairly prejudiced the defendant's defense. We initially note that in Iowa, the mere fact that a juror is acquainted with a witness does not necessarily disqualify that juror from sitting on the jury panel. Turner v. Jones, 215 N.W.2d 289, 290-91 (Iowa 1974); Thorp v. Rees, 224 Iowa 962, 965, 277 N.W. 758, 760 (1938). The record reveals that Miller

and Agent Shannon were co-employees at Gerkins. The record also reveals that the conversations between Miller and Agent Shannon at Gerkins were mostly limited to saying "hello" or "goodbye." There is no evidence in the record to support a finding that Miller and Agent Shannon interacted socially outside of their place of employment or otherwise developed a relationship other than that of being co-employees. Agent Shannon further testified that while he worked in the same place of employment with Miller, the two actually had little contact with each other while at work. Thus, the mere fact that Miller was a co-employee and had exchanged a few words with Agent Shannon will not lend support to a finding of prejudice.

During the voir dire of the prospective jurors when the prosecutor asked the panel members whether anyone knew Agent Shannon, Miller did not immediately raise his hand. When the prosecutor subsequently asked whether anyone on the panel knew the other police officers who may be called to testify, several prospective jurors raised their hands, including Miller. When Miller was asked whether his acquaintanceship with any of the officers would prevent him from being a fair and impartial juror, Miller responded, "I don't believe so, no."

The defendant, however, argues that Miller's response was directed toward the prosecutor's question of whether anyone knew the Sioux City police officers and was not directed toward the question of whether anyone knew Agent Shannon. The defendant therefore contends defense counsel could not have been alerted to the fact that Miller knew Shannon. The record, however, reveals immediately preceding the prosecutor's questions regarding whether anyone knew Agent Shannon or the police officers, the prosecutor remarked that Shannon and the Sioux City officers were <u>all</u> police officers but that Shannon's duties were distinct from those of the other two officers. This series of questions reasonably appraised the jury panel that Shannon was also a police officer. Miller's statement

that he knew one of the police officers therefore put defense counsel on notice that Miller had an acquaintanceship with one of the police officers. Defense counsel, however, did not further question Miller regarding the extent of his relationship to Agent Shannon. As we noted earlier, failure to object to a juror on the basis of known or ascertainable bias prior to the time the jury is sworn waives any future objection to that juror. Cuevas, 288 N.W.2d at 534. Since the defendant could have easily ascertained Miller's acquaintanceship with Agent Shannon by questioning on voir dire and could have challenged Miller for cause pursuant to Iowa Rule of Civil Procedure 187(f), the defendant may not now allege juror misconduct.

Nor do we find that there was a reasonable likelihood that Miller's acquaintance with Agent Shannon influenced the jury's verdict. Miller stated on voir dire that his acquaintanceship with Agent Shannon would not affect his ability to be a fair and impartial juror. The defendant has offered no evidence to show that Miller attempted to influence the jury as a result of this acquaintanceship. At no time during jury deliberations did Miller mention that he knew Agent Shannon. Only during the jury selection did Miller state to one other juror that he possibly knew one of the officers. From these facts we cannot find support for defendant's claim that the suffered prejudice as a result of Miller's acquaintanceship with Agent Shannon.

For similar reasons, we believe to hold that the prosecution's failure to inform the trial court or defense counsel of Miller's acquaintanceship with Agent Shannon constituted prosecutorial misconduct. While we believe it the better rule that a prosecutor, faced with a situation similar to that of the present case, volunteer such information, we are nonetheless convinced that the trial court was correct in finding no prosecutorial misconduct. See Turner v. Jones, 215 N.W.2d at 290. When Agent Shannon informed the prosecutor that he recog-

nized Miller as a co-employee, the prosecutor questioned him about his relationship with Miller. Agent Shannon told the prosecutor that he had very little contact with Miller and that it was possible that Miller did not even recognize him. Based on these facts, we cannot say that the prosecutor's actions were so unfair as to deny the defendant a fair and impartial jury. The defendant has not pointed to any evidence in the record suggesting that the prosecutor's decision not to inform the trial court or defendant was designed to in some way influence the jury's verdict.

For these reasons, we hold that the trial court did not abuse its discretion in denying the defendant's motion for new trial on the grounds that there was no juror or prosecutorial misconduct and that the defendant had failed to object to juror Miller before the jury was sworn.

AFFIRMED.