IN THE COURT OF APPEALS OF IOWA

No. 6-582 / 95-1117 000375

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RITA MAE BRAYBOY,

Defendant-Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

Defendant was convicted of first-degree murder in violation of Iowa Code section 707.1 (1993); and child endangerment in violation of section 726.6. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens and John M. Priester, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Richard Crowl, County Attorney, and Timothy O'Grady, Assistant County Attorney, for appellee.

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

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CADY, J.

Rita Mae Brayboy appeals her conviction of first-degree murder in violation of Iowa Code section 707.1 (1993), and child endangerment in violation of section 726.6.

Brayboy was the legal custodian of five of her grandchildren. On the afternoon of June 20, 1994, her four-year-old granddaughter, Monika Brayboy, was rushed by ambulance from Brayboy's home to a hospital. Monika died that night from a blunt force trauma to the head and severe shaking. The condition of Monika's body revealed she had numerous other injuries which were the result of prior acts of child abuse.

Brayboy was charged with first-degree murder and child endangerment. Following a jury trial she was found guilty as charged.

After the trial Brayboy filed a bill of exceptions and a motion in arrest of judgment and/or for new trial. Among other things, she claimed the jury committed misconduct during its deliberations by discussing a newspaper article about her case. She introduced the affidavits and testimony of two of the jurors. These jurors indicated on the second day of their deliberations another juror had informed them of a newspaper article about the case and had insinuated they needed to read it in order to be satisfied with a first-degree murder verdict.

Brayboy asserts the article was from a Council Bluffs newspaper and contained hearsay evidence excluded from the trial. The excluded hearsay involved

an alleged statement by one of Brayboy's grandchildren that Brayboy hit the victim over the head with a plunger. The jurors' affidavits indicated the day after the article was published another juror raised the theory Brayboy hit her granddaughter over the head with a plunger. They maintained this theory had not "been even remotely discussed" during the prior day's deliberations. The court concluded there was no evidence the article had been read by the jurors and there was no reasonable probability the existence of the article influenced the verdict and resulted in prejudice to Brayboy.

On appeal, Brayboy alleges the court abused its discretion by failing to find jury misconduct. She argues the court erroneously disregarded those portions of the affidavits which it concluded inhered in the jury deliberations and verdict and were not admissible under Iowa Rule of Evidence 606(b). She contends the affidavits and testimony at the post-trial hearing provide persuasive evidence that an outside influence, the newspaper article, was brought to the attention of several jurors and affected the verdict. She asserts the court improperly denied her motion for a new trial.

Brayboy additionally argues her trial counsel were ineffective in failing to challenge the submission of the "knowingly permitted" alternative of the child endangerment offense to the jury. She contends her counsel should have raised this in her motion for acquittal and her counsel should have requested specific jury instructions on this issue. She claims her counsel should have objected to the

allegedly misleading comments the State made about this alternative offense in its closing argument.

Brayboy also claims trial counsel were ineffective in failing to make a proper record concerning alleged prosecutorial misconduct. The purported misconduct involved allegations an intern from the county attorney's office and another individual sitting next to an assistant county attorney wept when Monika's autopsy photos were shown. The trial court found Brayboy failed to demonstrate the weeping, if it occurred, prejudiced Brayboy. Brayboy requests this claim be preserved for review on postconviction relief. Finally, she alleges trial counsel were ineffective in failing to introduce sufficient evidence of her disability. Brayboy argues such evidence would have demonstrated she was physically incapable of causing her granddaughter's death. She requests this claim also be preserved for postconviction relief. In response, the State argues both of the latter claims should not be preserved but should be denied on direct appeal.

I. Juror Misconduct

The trial court has a broad discretion in ruling on allegations of juror misconduct. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). We do not find an abuse of discretion unless the court's action was clearly unreasonable under the attendant circumstances. *State v. Wells*, 437 N.W.2d 575, 581 (Iowa 1989).

"Trials are to be decided on facts produced in court under rules of evidence and subject to cross-examination." *State v. Folck*, 325 N.W.2d 368, 372 (Iowa

1982). However, in order to impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts concerning what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Arnold*, 543 N.W.2d 600, 605 (Iowa 1996).

Brayboy contends the jury committed misconduct by discussing a newspaper article about her case. In support of her allegation she introduced the affidavits and testimony of two of the jurors. The affidavits which were substantially similar stated in part:

> 4. During deliberation on the morning of May 11 one of the jurors referred to a news article that her son had brought to her the previous night. He had told her that reading the article would make it clear to her what her verdict should be. She denied reading the article but insisted repeatedly that we all needed to read the article so that we would be satisfied with a verdict of murder in the first degree. This juror became very active in the deliberation on Thursday. She became insistent on a murder in the first degree verdict on Thursday.
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> 5. During deliberation on the morning of May 11 another juror stated that after considering the case during the night he had concluded that Rita "hit Monika over the head with a plunger". This theory had never been even remotely discussed the day before and appeared to just come out of nowhere. Having now read the article from Wednesday's paper I know where this came from.
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> 6. At least one juror other the Ms. Davis who was not willing to sign a murder in the first degree verdict on Wednesday changed his mind after this information entered into the deliberations on Thursday.

At the start of the hearing on Brayboy's motion, the trial court indicated it would only consider a portion of the affidavits which were entered into evidence. Specifically the court considered the following excerpt:

> During deliberations on the morning of May 11 one of the jurors referred to a news article that her son had brought to her the previous night. He had told her that reading the article would make it clear to her what her verdict should be. She denied reading the article but insisted repeatedly that we all needed to read the article so that we would be satisfied with a verdict of murder in the first degree.

Brayboy also introduced several paragraphs of the article she alleges prompted the comments about the plunger during jury deliberations. The article stated Teasha, Monika's older sister, told a social worker her grandmother had hit Monika over the head with a plunger. This evidence had been excluded by the trial court as hearsay.

Three jurors testified at the hearing on Brayboy's motion. Two of the jurors confirmed a juror had repeatedly suggested the other jurors must read the newspaper article in order to assist in rendering a verdict in the case. The other juror testified he did not hear another juror speak of being approached by her son concerning a newspaper article.

Brayboy contends the trial court abused its discretion by not finding jury misconduct. Specifically, Brayboy argues the court erred in striking from its consideration those portions of the affidavits which it concluded inhered in the jury deliberations and verdict and were not admissible under Iowa Rule of Evidence 606(b). She contends the affidavits and testimony at the post-trial hearing provide

persuasive evidence that an outside influence, the newspaper article, was brought to the attention of several jurors and affected the verdict. She asserts the court improperly denied her motion for new trial.

A. *Evidence of misconduct:*

Prior to determining whether Brayboy has met the three conditions required to impeach a jury verdict, we must address the allegation the trial court erroneously disregarded evidence which Brayboy asserts demonstrates misconduct. Iowa Rule of Evidence 606(b) delineates the extent to which a juror's testimony regarding jury deliberations may be considered. The rule allows the district court to consider testimony by a juror regarding "whether extraneous prejudicial information was improperly brought to the jury's attention." Iowa R. Evid. 606(b). However, to protect the sanctity of the jury room and the deliberative process itself, the rule also renders jurors incompetent to testify regarding arguments, votes, and mental reactions occurring during the deliberations. *Doe v. Johnston*, 476 N.W.2d 28, 34 (Iowa 1991).

Brayboy first asserts the court should have considered paragraph 5 of the affidavits concerning the statement about the plunger. She argued the statement was admissible because it came right out of the article and therefore was extraneous material.

The trial court concluded, and we agree, paragraph 5, without more, did not raise a reasonable inference that the juror was exposed to extraneous matter. Brayboy presented no additional evidence at the hearing that would support this inference.

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The juror who asserted the plunger theory was not the same juror whose son was referring to the newspaper article. There was no evidence a juror actually read a newspaper article. There was evidence no juror brought a newspaper into the jury room. Moreover, there was sufficient evidence presented at the trial for the juror to infer plunger was used to beat Monika.

Further the trial court did not abuse its discretion in excluding the remaining portions of the affidavit from consideration. The additional excluded statements were not probative of the jury's alleged exposure to extraneous matters, or inhered in the jury's internal workings. *See State v. Jones*, 511 N.W.2d 400, 409 (Iowa App. 1993); Iowa R. Evid. 606(b).

B. Influence on the Verdict

Without specifically considering the first two prongs of the test for jury misconduct, we conclude Brayboy's complaint of misconduct fails under the third prong. Brayboy has failed to demonstrate there was a reasonable probability the misconduct influenced the verdict. The trial court found there was no reasonable probability the existence of the article influenced the verdict and resulted in prejudice to Brayboy. Given the vague nature of the alleged misconduct, and the lack of evidence any juror read a newspaper article about the trial we cannot say the trial court abused its discretion

II. Ineffective Assistance

We generally reserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Mann*, 512 N.W.2d 817 (Iowa 1993). This allows counsel an opportunity to fully respond to the claims. *Id.*

We conclude Brayboy's claims of ineffective assistance of counsel based on counsel's failure to challenge the submission of the "knowingly permitted" alternative of the child endangerment offense to the jury and failure to introduce sufficient evidence of her disability should be preserved for postconviction proceedings. The present record fails to fully present the issues raised by the claims, and it would be helpful to permit trial counsel to respond to the claims.

However, the record is sufficient to show Brayboy's claim of ineffective assistance of counsel based on alleged prosecutorial conduct is without merit. A defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that, but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Hildebrant*, 405 N.W.2d 839 (Iowa 1987). Our standard of review is to evaluate the claim based on the totality of the circumstances. *Wissing*, 528 N.W.2d at 563.

Brayboy's remaining claim regarding prosecutorial misconduct is insufficient to establish prejudice. Brayboy raised the same issue in her motion in arrest of judgment and for new trial. The judge who ruled on the motions was the same judge who conducted the trials. *See State v. Hackett*, 197 N.W.2d 569, 573 (Iowa 1972) (trial court is in position to see and hear everything that transpired at trial, including impact spectators conduct). The trial court found there was no evidence indicating the weeping, if it occurred, prejudiced Brayboy. Further the trial court found there was no showing any of the jurors was aware of the alleged weeping. The trial record, the ruling, and the bill of exceptions presented at Brayboy's hearing at on motion for new trial present an adequate record on direct appeal to find that the defendant was not prejudiced Brayboy has not met her burden to establish prejudice.

AFFIRMED.