FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, )

vs. )

MARK HARRINGTON, )

Defendant-Appellant. )

Filed November 30, 1983

3-277
69167

Appeal from Woodbury District Court, James P. Kelley, Judge.

Defendant appeals his conviction for murder in the second degree under Iowa Code section 707.3 (1981) and willful injury under Iowa Code section 708.4 (1981). REVERSED AND REMANDED.

Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

Defendant appeals his conviction for murder in the second degree under Iowa Code section 707.3 (1981) and willful injury under Iowa Code section 708.4 (1981). We reverse the convictions and remand for a new trial.

Defendant was accused of stabbing and injuring Mark Kemp and fatally stabbing Larry Johnson in the early morning hours of February 20, 1982. Shortly after his arrest he was taken to the police station to be interviewed by Sergeant Bean and Lieutenant Groves. Bean advised defendant of his Miranda rights and defendant indicated that he understood them. Defendant then signed an acknowledgement that he had been informed of his rights. Defendant stated, "Wish I knew what was going on." Bean told him that Larry Johnson was dead and Mark Kemp was in the hospital. Bean reminded defendant that he did not have to talk about it if he did not wish to. Defendant stated he would like to talk about it but wanted a lawyer present. No further questions were asked of him. Defendant requested to be put in "short time" with Russell Thorngren so that he could harm him. Bean responded," You've got enough problems now." Defendant remarked that one more would not hurt him.

Although the conversation continued, only the statements of defendant requesting to be allowed to harm Thorngren and stating that one more problem was of no consequence were admitted into evidence at trial over defense counsel's objection.

During direct examination of the defendant, counsel asked whether Danny Cain, one of the defense witnesses, had made any threats against Larry Johnson. The trial court sustained the prosecutor's hearsay objection and refused to allow defense counsel to make an offer of proof.

Prior to trial the court ruled that evidence of defendant's prior shooting of his brother was inadmissible. During deliberations, however, the jury became aware of and discussed this incident. Defendant's motion for a new trial was overruled.

Defendant was convicted and sentenced to up to twenty-five years in prison for murder and up to ten years for willful injury. The court directed the terms to be served consecutively but failed to state on the record the reasons for imposing consecutive sentences.

Our review of a criminal case is on assigned error. However, when basic constitutional guarantees are implicated, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I.

Admissibility of Defendant's Statements

Defendant alleges that any statements made by him to the police during the interview with Bean and Groves should have been suppressed since his request for counsel was not scrupulously honored. While it is true that once a criminal defendant requests counsel, all interrogation must cease, statements subsequently volunteered to the police by the defendant are admissible. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981); State v. Matlock, 289 N.W.2d 625, 627-28 (Iowa 1980). The evidence in this case shows that defendant was read his rights and understood them. The police stopped questioning him immediately after he requested counsel. Defendant's request to be put in "short time" and his comment that one more problem would not matter were volunteered. Therefore, it as not error to admit those two statements into evidence.

II.

Offer of Proof

Ordinarily refusal to permit the making of an offer of proof is error. State v. Cook, 330 N.W.2d 306, 313 (Iowa 1983). The State argues that there is no error when it is obvious from the question asked what information counsel was attempting to elicit. The cases relied upon by the State hold that no offer of

proof is necessary to preserve the error of excluding admissible evidence if the materiality of the excluded evidence is obvious to the appellate court. See In re Estate of Harm, 284 N.W.2d 191, 197 (Iowa 1979); State v. Ritchison, 223 N.W.2d 207, 213 (Iowa 1974). These cases do not address the issue of whether the trial court should allow a requested offer of proof to be made. We believe that the court in this case should have allowed the offer of proof. Although we can determine what information defense counsel was seeking, it is impossible for us to determine based on the record before us whether the evidence was properly excluded. If counsel had been allowed to make an offer of proof he may have established that the evidence was admissible under one of the numerous exceptions to the hearsay rule.

We do not agree with the State's further contention that the refusal to allow an offer of proof was harmless beyond a reasonable doubt. Defendant's answer to the question may have been used to impeach the testimony of Danny Cain. While Cain was a defense witness, his testimony was at times hostile to defendant's case. We believe it was prejudicial to refuse defendant an opportunity to demonstrate and make a record of the admissibility of threats made by Cain against Johnson.

III.

Juror Misconduct

Defendant claims that the trial court erred in denying his motion for a new trial on the grounds the jury improperly considered the fact that defendant had at one time shot his brother.

Under Iowa Rule of Criminal Procedure 23(2)(b)(2), the court may grant a new trial if the jury receives evidence not authorized by the court. The granting or denial of a new trial is a matter of the court's discretion. State v. Folck, 325 N.W.2d 368, 373 (Iowa 1982).

In order to prevail on this issue defendant must show: (1) acts or statements of the jury which constitute misconduct; and (2) that the misconduct was calculated to and probably did influence the verdict. Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978).

The affidavits of two jurors were presented in this case which state that the jury discussed defendant's prior shooting of his brother. Both before and during trial the court ruled this evidence inadmissible. We conclude that the jury's consideration of this evidence exceeded the tolerable bounds of jury deliberation and constitutes misconduct.

We now turn to the second prong of the test to determine whether the misconduct was calculated to and probably did influence the verdict. Although one juror's affidavit indicates this information influenced her decision, we do not consider this part of the affidavit. A juror's statements of a subjective nature as to what influenced a jury verdict are incompetent. Harris v. Deere & Co., 263 N.W.2d at 730. We do, however, examine all of the circumstances to determine whether defendant has made the requisite showing.

We can find no reason why the jury would discuss this incident except to infer that defendant was a bad person capable of committing the crime with which he was charged. Our rules of evidence are formulated to prevent such inferences from being drawn. It is clear that the jury's consideration of this information was calculated to and probably did influence the verdict.

In reaching this conclusion, we distinguish the case of State v. Jackson, 195 N.W.2d 687 (Iowa 1972). In Jackson the defendant, accused of assault with intent to murder, admitted at trial of having been convicted of a prior felony. The jury learned during deliberations that defendant had been convicted of murder. The foreman sent a note to the judge asking for the nature and date of the conviction. The court brought the jury back into the courtroom and admonished it that the

nature of the prior felony had not been admitted into evidence and was not to be considered by them. A juror affidavit stated that the jury deliberated for five hours after the admonition and the prior conviction was not mentioned again. The supreme court held that there was no error in denying a motion for a new trial. State v. Jackson, 195 N.W.2d at 689-90.

The present case is similar to Jackson but lacks the indicia of fairness present in that case. Here there was no opportunity for the court to admonish the jury not to consider the inadmissible information nor was there any showing that the information was only briefly discussed.

IV.

Consecutive Sentences

Since we conclude that for the reasons outlined above defendant is entitled to a new trial, we need not dwell on this issue. However, we remind the trial court that the reason for imposing the particular sentence must be stated on the record. Iowa R. Crim. P. 22(3)(d).

REVERSED AND REMANDED FOR A NEW TRIAL.