

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1989

CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DONNIE LEE WYLDES, JR.,)
Defendant-Appellant.)

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8-465
87-1156

Appeal from the Iowa District Court for Wayne County
(No. 20991), Thomas S. Bown, Judge.

Defendant appeals from his conviction following a jury
trial for first-degree murder. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and
Barbara M. Anderson, Assistant Appellate Defender, for
defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden and
Virginia Barchman, Assistant Attorneys General; and Alan M.
Wilson, Wayne County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

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Defendant appeals from his conviction, following a jury trial, for first-degree murder. He contends the district court erred by overruling his motion for a new trial on the ground of juror misconduct. He also contends the district court erred by overruling his challenge for cause to one of the potential jurors.

The defendant was accused of shooting and killing a homeowner during an apparent burglary attempt. A jury found the defendant guilty of first-degree murder. He has appealed from the resulting conviction and sentence.

I. Defendant contends the trial court erred in overruling defendant's motion for a new trial on the ground of jury misconduct. He alleges the jury received and considered evidence not admitted at trial. According to affidavits of three jurors, another juror, after hearing an expert witness testify, fired his own .22 caliber rifle seventeen times and compared the markings left on the casings. He reported to the jury that there were variations in the marks when fired from the same gun.

The trial court has broad discretion in ruling on a motion for new trial based on jury misconduct. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). We do not find an abuse of discretion unless the trial court action was clearly unreasonable under the circumstances. State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984). Thus, we

examine the trial court's ruling in light of these well-settled principles.

The trial court found that defendant failed to establish by competent evidence the objective fact that actually happened with respect to the test firing. One affidavit named Paul Snyder as the juror who test fired his gun. The other two affidavits did not name the juror. However, the trial court was persuaded by the fact that Paul Snyder denied having test fired his gun. His affidavit indicated he intended to shoot his gun, but did not. Therefore, the trial court could not find by competent evidence that the test firing actually occurred.

We find no abuse of discretion because the trial court's decision was not clearly unreasonable. The law requires a three-part test be used when determining whether a verdict can be impeached on the basis of jury misconduct. Cullen, 357 N.W.2d at 27. The trial court's findings were based on the first prong of the test.

To find juror misconduct, evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation by constituting jury misconduct. Finally, it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict. Id.

If the gun was not test fired, but the juror expressed his belief on what the result would be, then the discussion is within the bounds of jury deliberation. Juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room are protected components of jury deliberations. Ryan v. Arneson, 422 N.W.2d 491, 495 (Iowa 1988).

Furthermore, as the trial court noted, even if the juror did test fire the gun, it did not appear that it with reasonable probability influenced the verdict. The expert witnesses for both the State and defendant compared similar markings on casings to link defendant's gun to the scene of the crime. The juror allegedly said the marks were different when fired from the same gun. If this juror's statements were believed, it could have helped defendant's case. Since the jury found defendant guilty, it was not unreasonable to find that this juror conduct did not with reasonable probability affect the verdict. Therefore, we agree with the trial court that jury misconduct warranting a new trial has not been shown.

II. The second claim by the defendant is that the trial court abused its discretion in overruling defendant's challenge for cause to venireman Jean Hager. Defendant contends this venireman had a predisposition to find him guilty. Defendant exercised a peremptory ~~strike~~ to remove

this person from the panel. Defendant exercised the remainder of the ten strikes and thus requests reversal and a new trial.

Three principles govern our review of questions concerning denial of defendant's challenge for cause of a prospective juror. First, the trial court is vested with broad, but not unlimited, discretion in ruling upon a challenge for cause. State v. Williams, 285 N.W.2d 248, 267 (Iowa 1979), cert. denied, 446 U.S. 921, 100 S. Ct. 1859, 64 L. Ed. 2d 277 (1980). Second, a determination of a prospective juror's qualifications must rest upon the entire record of the examination. Id. Third, the trial court sits as judge on the facts on the question of existence of a ground for challenge. Id.

Defendant's concern centers around Mrs. Hager's belief that the man the police arrested was guilty of the crimes charged. She had read news accounts and discussed it with community members. However, an opinion based on pretrial information alone is not sufficient to show cause. State v. Gavin, 360 N.W.2d 817, 819 (Iowa 1985).

Furthermore, considering the entire record, defense counsel's use of leading questions minimized the value of Mrs. Hager's answers. Defense counsel questions created the appearance of Mrs. Hager being disqualified. This was the case in Williams where the court said if error had been preserved, reversal would not have been mandated. 285 N.W.2d at 267.

It is significant that the court questioned Mrs. Hager before ruling on the motion to strike for cause.

THE COURT: Mrs. Hager, I will instruct whatever jury that is selected to try this case that the Defendant is presumed innocent and not guilty of the crime charged and that he can be convicted, if convicted at all, only by the evidence as it comes in in the courtroom from the witness stand and according to my instructions as to the law. Could you follow that instruction if I told you that was the law?

MRS. HAGER: Yes.

THE COURT: All right. Overruled.

Even though Mrs. Hager had formulated an opinion as to defendant's guilt prior to trial, she readily conceded that she could put her preliminary opinion aside pending the evidence. She did not say it would be difficult for her to acquit the defendant even though the evidence warranted it, which would have made this a different case. She was not confused or pressured into answering this question affirmatively. The trial court believed that Mrs. Hager would faithfully execute her duty.

In State v. Teale, the court described the test to be used when determining if a juror is qualified.

In the examination of jurors as to their qualifications to try a case, the sole question to be determined by the trial court is whether they can fairly and impartially hear the evidence, and render a verdict thereon which shall be entirely free from the aid or influence of previous knowledge or preconceived opinions. And in the very nature of the situation the trial court must be given discretion in such matters which will not be interfered with, unless an abuse of discretion be shown. [citations omitted.]

A person is qualified to act as a juror when it is apparent from his entire examination that, notwithstanding his present knowledge of the facts

or any opinion which he may have formed therefrom, he can try the case fairly and impartially on the evidence alone. [citations omitted.]

154 Iowa 677, 681-82, 135 N.W. 408, 410 (1912). We think it is apparent from the entire examination of Mrs. Hager that she did not have such a fixed and unqualified opinion as to disqualify her. Therefore, we find no abuse of discretion by the trial court. The decision is affirmed.

AFFIRMED.