

FILED

JAN 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed January 26, 1982

vs.

)

CHRISTOPHER J. JENNINGS,

)

1-351

64943

Defendant-Appellant.

)

133

Appeal from Clinton District Court - Larry D. Carstensen, Judge.

Defendant appeals from judgment and sentence upon his conviction for involuntary manslaughter (a class D felony) in violation of section 707.5(1), The Code. REVERSED.

John R. Wolfe, Jr., Clinton, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from judgment and sentence upon his conviction for involuntary manslaughter (a class D felony) in violation of section 707.5(1), The Code. He argues that the court committed reversible error in issuing instructions to the jury that failed to adequately distinguish between the felony and misdemeanor forms of involuntary manslaughter, in failing to submit an instruction to the jury on the lesser included offense of assault, and in failing to grant defendant a new trial on the basis of a comment relating to guilt made by the jury foreman at a public restaurant during the course of the trial. We reverse and remand for a new trial because of the juror misconduct.

Defendant Christopher Jennings and several other young men were involved in a brawl outside a bar in Clinton, Iowa, on November 17, 1979. During the melee, one of the participants was injured by being hit and kicked; he aspirated blood and/or gastric substances and died. Defendant was charged with voluntary manslaughter in violation of section 707.4, The Code 1979, and was convicted after trial to a jury of involuntary manslaughter in violation of section 707.5(1), The Code 1979.

Trial began March 18, 1980, and the matter was submitted to the jury March 21. On March 20, during a lunch break, the jury foreman, Kevin Kane, and another juror, wearing their juror badges, had lunch in a public restaurant. Kane and the restaurant owner were acquainted, and the owner struck up a conversation with Kane about the trial in progress. Although the conversation apparently was general in nature, at one point, when the conversation turned to defendant, Kane was heard to say, "We're gonna hang him." Defendant's counsel subsequently learned of Kane's remark from another patron of the restaurant who had heard the comment, and he made a motion for a new trial. An evidentiary hearing on the motion was held March 28. In overruling defendant's motion, the court stated:

I find the juror conduct complained of in this case before this Court was not calculated to influence the verdict, and that it is not reasonably probable that it did influence the verdict. I find that the juror had not made up his mind at that point in the trial. The juror's conduct is to be deplored and he regrets it. It raises questions to the fairness of the trial, but I must find that this conduct does not indicate or create actual failure of fair trial.

I. Juror Misconduct. Two strains of juror misconduct have evolved throughout our case law. One relates generally to activities undertaken by a juror which in some way imply special knowledge of the facts. See, e.g., Harris v. Deere & Co., 263 N.W.2d 727, 731 (Iowa 1978) (juror told others on the jury that he had a conversation with one of the parties about settlement; not grounds for a new trial). The standard for granting a new trial in such cases is first, does the complained of activity constitute misconduct, i.e., do the acts or statements exceed tolerable bounds of jury deliberation and, if it is misconduct, does it appear that the misconduct was calculated to and reasonably probably did influence the verdict. Harris v. Deere & Co., 263 N.W.2d at 730.

The second strain of juror misconduct cases in Iowa deals generally with the appearance of proceedings surrounding juries and the preservation of confidence in the jury system. These cases center around the idea that "the jury is to be above suspicion and that any practice which brings its proceedings under suspicion is to be prohibited." State v. Carey, 165 N.W.2d 27, 29 (Iowa 1969) (sign posted by coffee in jury room during a criminal trial informed jury that coffee was paid for by county attorney; grounds for reversal). "In order that the institution of jury trials be preserved and its usefulness continued, its deliberations and pronouncement must be kept pure, and untainted, not only from all improper influences, but from the appearance thereof." Daniels v. Bloomquist, 258 Iowa 301, 306, 138 N.W.2d 868, 872 (1965). In Omaha Bank for Cooperatives v. Siouland Cattle Co-op, 305 N.W.2d 458 (Iowa 1981), a juror bought drinks one evening for two of the

attorneys of one of the parties during the course of the trial. It was unquestioned that the trial was not discussed and that the lawyers involved immediately informed the court and opposing counsel about the incident. Even so, the supreme court said: "In cases of such gross impropriety, even if the meeting were unintentional, we are not only concerned with injustice to particular litigants, but also with the appearance of impropriety that casts doubt on our jury system."

Omaha Bank for Cooperatives v. Siouxland Cattle Co-op, 305 N.W.2d at 463 (cites omitted).

In a similar situation, and one not unlike the case before us, a juror had a conversation with a bystander in which the juror said that the defendant's attorney had mismanaged the case, was not fit to attend such a case, and that the plaintiff ought to recover the full amount of the damages he sought. Perry v. Cottingham, 63 Iowa 41, 42, 18 N.W. 680, 680-81 (1884). The court found that not only had the juror entered into a conversation, but that his comments indicated his mind was made up and, from that time on, his mind was in no condition to fairly hear or consider evidence. Perry v. Cottingham, 63 Iowa at 41, 18 N.W. at 681.

We think the effect of Kane's statement at the restaurant most closely resembles the effect of situations described in the second strain of juror misconduct cases. The record reflects that the trial court properly admonished the jurors as to what their conduct ought to be should any person attempt to communicate with them about the trial. Despite the warning, Kane did have a conversation about the case with a friend in a public place loud enough to be overheard by at least one other member of the public. Not only is the impropriety of the conversation apparent, but we think the content of the remark "We're gonna hang him" could indicate to the public that the foreman of a jury in an ongoing criminal case had made up his mind as to guilt before hearing all of the evidence. This cannot be condoned, even though Kane testified at the March 28 hearing that he did in fact approach deliberation with an open mind and the trial court decided

that his comment was not calculated to and reasonably probably did not influence the verdict. Such is not the standard in cases of juror misconduct affecting the integrity of our judicial system. As the supreme court stated approvingly in Daniels v. Bloomquist, 258 Iowa at 306, 138 N.W.2d at 872: "It is often said that the jury trial is one of the bulwarks of our liberty, but it will remain so only as long as public confidence in the institution prevails." Lavelley v. State, 188 Wis. 68, 80, 205 N.W. 412, 417 (1925). It is regrettable that this incident occurred, but its very occurrence mandates reversal for a new trial for defendant. No one can guarantee any defendant a perfect trial, but he is entitled to one where a juror's remarks do not suggest to all within hearing a possible bias and an inability to objectively perform the duties required of him by our system. See, Metropolitan Paving Co. v. International Union of Operating Engineers, 439 F.2d 300 (10th Cir.), cert. denied, 404 U.S. 829, 92 S. Ct. 68, 30 L. Ed. 2d 58 (1971). Although the granting or denial of a new trial is within the discretion of the trial court, that discretion is not unlimited, and can be exercised only for sound judicial reasons based on the record. In re Springer's Estate, 252 Iowa 1220, 1236, 110 N.W.2d 380, 390 (1961). In the present case we think trial court abused its discretion and applied the wrong standard in evaluating Kane's comments. Consequently, we reverse and remand for a new trial.

II. Jury Instructions on Remand. Defendant argues on appeal that he was entitled to a jury instruction on assault as a lesser included offense. He also asserts that the instructions as given on the requisite elements of involuntary manslaughter served to confuse, not clarify, the law in that the jury could have understood the instructions to mean that less intent or culpability was required to prove the felony of involuntary manslaughter than was needed to prove the aggravated misdemeanor of involuntary manslaughter. Because the case is to be retried, we think some direction on both may be helpful.

Section 707.5(1) and section 707.5(2), The Code, define crimes of involuntary manslaughter. Section 707.5(1) is a class D felony, while section 707.5(2) is an aggravated misdemeanor. State v. Inger, 292 N.W.2d 119, 123-24 (Iowa 1980), recognizes the very narrow area in which the aggravated misdemeanor offense may be established under section 707.5(2), The Code. This area involves only those unlikely instances in which the accused committed an act in a manner likely to cause death or serious injury but which does not constitute a public offense. We find that the instructions of the trial court in the present case adequately observed the difference between the felony and misdemeanor offenses of involuntary manslaughter by means of requiring the finding of a specific public offense (assault) as to the felony charge and deleting any such requirement with respect to the aggravated misdemeanor charge. These instructions are therefore without error based on any of the claims urged by defendant.

Defendant also argues that assault should have been submitted as a lesser included offense. Because the jury's verdict served to acquit defendant of voluntary manslaughter and he cannot be retried on that charge, we consider this claim only with respect to the charges of involuntary manslaughter. Clearly, assault is not a lesser included offense under the aggravated misdemeanor charge. On the felony manslaughter charge, we find that, even though assault may arguably be the only public offense committed under the facts of this case which makes it possible to find that defendant could be guilty of the felony form of involuntary manslaughter, he is not entitled to an instruction on assault. "Evidence of an assault may be used to prove the public offense element of a felonious involuntary manslaughter charge, but the element may also be established through proof of other public offenses. Thus the statutory delineation of the greater offense does not include assault as a necessary constituent." State v. Webb, ___ N.W.2d ___ (filed Dec. 23, 1981).

REVERSED.