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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,

vs.)

JAN HERBERT HOLLINS,)

Defendant-Appellant.

Filed September 6, 1984 312

4-250
83-1108

Appeal from the Iowa District Court for Linn County--Thomas L. Koehler, Judge.

Defendant appeals from convictions and sentences for two counts of willful injury, one count of attempt to commit murder, one count of carrying a weapon in violation of Iowa Code section 724.4, and one count of assault without intent to inflict serious injury but resulting in injury. AFFIRMED.

Alfredo G. Parrish, Des Moines, for the defendant-appellant.

Thomas J. Miller, Attorney General and Sherie Barnett, Assistant Attorney General, for the plaintiff-appellee.

Considered by Snell, P.J., Hayden and Sackett, JJ.

SACKETT, J.

On October 15, 1982, a trial information was filed against the defendant, Jan Herbert Hollins. The information charges that the defendant drove a vehicle into his ex-wife, Ms. Sears Lockett, and his brother-in-law, Mr. Alvin Davidson, severely injurying them. Also, that defendant then proceeded to exit his vehicle, firing shots from a .357 Magnum at the two. Following an exchange of gunfire between the defendant and Davidson and Lockett the defendant left the scene. He was taken into police custody a short time later.

On January 11, 1983, the defendant was scheduled to stand trial on the above-mentioned charges in Iowa District Court for Black Hawk County, however, the trial was postponed as a result of the shooting death of Mr. Alvin Davidson on January 10, 1983. At least six (6) weeks after Mr. Davidson's death, three (3) individuals were arrested and charged with First Degree Murder in Mr. Davidson's death. One of those individuals was the defendant's brother, Jay Hollins, however, no connection was ever made between the events of October 4, 1983, and Davidson's death.

Trial in this case was held in the Iowa District Court for Linn County on a change of venue from Black Hawk County. This was due in part to the publicity generated by Mr. Davidson's death. This matter came on for trial by jury on June 13, 1983. On June 22, 1983, the jury rendered a verdict against the defendant for the crimes of: Count I, Assault without Intent to Inflict Serious Injury but Resulting in Bodily Injury; Count II, Attempt to Commit Murder; Count III, Carrying Weapons; Count IV, Willful Injury; Count V. Willful Injury. Defendant subsequently filed an Application for a New Trial on July 12, 1983. The motion was overruled on July 27, 1983. Timely Notice of Appeal was filed on August 9, 1983.

On appeal, the defendant contends that security measures taken during his trial were so conspicuous that they prejudiced the jury against him. He also

contends that some of the jurors learned the circumstances of Davidson's death during trial, and that other jurors knew of Davidson's death before trial but concealed their knowledge during voir dire. He argues that the trial court should have granted him a new trial for both these reasons. The defendant also contends he was denied due process because the prosecutor interviewed a potential defense witness without the defendant's knowledge or participation.

Finally, the defendant challenges the conviction for carrying a weapon in violation of Iowa Code section 724.4. That statute imposes a broad prohibition against carrying weapons and then specifies eight exceptions to the prohibition, including an exception for the holder of a valid permit to carry weapons. The defendant argues that the absence of these eight exceptional circumstances is an element of the crime which must be proved by the state.

I. CONTENTION THAT SECURITY MEASURES PREJUDICED THE JURY AGAINST THE DEFENDANT.

Prosecutional 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. Williams, 315 N.W.2d 45, 55 (Iowa 1982). On appeal, we will intervene only if the trial court abuses the broad discretion which it has to determine whether prejudice results. Id. The defendant needs to make a showing of unfairness which resulted in prejudice. See State v. Hoskins, 316 N.W.2d 679, 681 (Iowa 1982).

The misconduct complained of by the defendant centers around the security measures employed during trial in Linn County. The security procedures involved search by a metal detector of people entering the courtroom. The metal detector was approximately 14 inches in length and 4-5 inches wide. The search was conducted merely by sweeping the detector over the bodies of persons coming into the courtroom. One officer each from Linn County and Black Hawk County sheriff's department were present, in civilian clothes, to conduct the searches.

Only people entering the courtroom were searched, and none of the jurors were subjected to the search procedures. While some jurors were seated outside the court room, they were some 50 feet away from where the searches were conducted. Mr. Mike Zlatohlavek testified that as a Linn County deputy, he had been instructed to search persons coming into the courtroom with a metal detector. He indicated that he was unaware whether any of the people in the corridor watching this procedure were jurors. He testified that the security people in Black Hawk County had informed them that there might be an attempt to take the defendant from their custody. The search procedures were terminated immediately upon defendant's request. There is no showing that the observation of these search tactics by some members of the jury for a brief length of time had any prejudicial effect on the verdict returned in this case.

A trial judge trying a case of this kind has a problem of balancing fair trial demands with security and safety. No trial is perfect. A trial judge looking back over a trial is in a better position than we are to say whether a reasonable accommodation of the two interests has been achieved; the judge is thus given considerable discretion in ruling on motions involving issues of this kind. State v. Kile, 313 N.W.2d 558, 562 (Iowa 1981).

No showing has been made that the jury was prejudicially affected by the witnessing of search procedures conducted toward persons entering the courtroom. The exposure of the jury to observation of the searches with the metal detectors were brief at most, and of limited duration.

On the record before us, we conclude that the witnessing of search tactics by a few jurors did not deprive the defendant of a fair trial. The trial court did not abuse its broad discretion in this area in overruling defendant's motion for a new trial.

II. JURY MISCONDUCT.

One basis of this appeal is defendant's assertion of jury misconduct in two

particulars. First, it is the defendant's contention that certain members of the jury were aware that Mr. Alvin Davidson, one of those injured when defendant's car allegedly struck him, was shot and killed in Waterloo, Iowa the day before the defendant's trial was originally scheduled to begin. Defendant also contends that these jurors both failed to reveal this information during voir dire examination and also discussed it with other jurors prior to the reaching of a verdict. Further, it is contended that certain jurors saw news reports of the Alvin Davidson shooting and failed to report this fact until after the verdict was rendered.

Trial courts have broad discretion in ruling on motions predicated on jury misconduct. See State v. Houston, 209 N.W.2d 42, 44 (Iowa 1973). Motions based on alleged jury misconduct involve two basic problems. One, the procedural problem of proving the facts as to what happened, and two, the substantive problem of the effect of the facts which are proven. As to the first problem, jurors may give evidence of objective facts as to what transpired in or out of the jury room bearing on misconduct. Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 210 (1866). However, jurors' statements which are subjective as to what happened are incompetent. Id. As to the second problem, once the objective facts are proven, relief is available only if two criterion are met. First, the acts or statements complained of must exceed tolerable bounds of jury deliberation, i.e., they must amount to jury misconduct. The other element is embodied in the rule, "in order to justify a new trial on the basis of misconduct of jurors it must appear that the misconduct was calculated to, and it is reasonably probable it did, influence the verdict." In Re Estate of Cory, 169 N.W.2d 837, 845 (Iowa 1969).

There is no evidence that any of the jurors withheld any substantial information during voir dire. Voir dire of prospective jurors should be trusted to expose any substantial prejudice. See United States v. Lamb, 575 F.2d 1310, 1315 (10th Cir. 1978), cert. denied sub nom., 439 U.S. 854 (_____). The death of

Alvin Davidson was brought up by someone in the jury room after the deliberations, but there is no evidence to suggest that it was discussed in connection with the formulation of a verdict. There is no evidence that any juror had been exposed to any news of Alvin Davidson's death through television reports, radio or the newspaper. However, mere exposure to news accounts does not prove a substantial likelihood of prejudice. See Chadwick, 328 N.W.2d 913, 916 (Iowa 1983).

Therefore, it cannot be said that the trial court abused its discretion in denying the defendant's motion for a new trial on the basis of jury misconduct. Nothing occurred during voir dire, the trial itself, or in the jury room which would be calculated to, or are reasonably probable to have, influenced the verdict. I

III. CONTENTION THAT DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BY STATE'S SUBPOENA AND INTERVIEW OF A WITNESS WITHOUT NOTICE TO THE DEFENDANT.

Rule 5 of the Iowa Rules of Criminal Procedure contains a provision whereby the prosecuting attorney may direct the clerk of the district court to issue subpoenas to witnesses whom the prosecutor may require in investigating an offense. Ia. R. of Crim. P. 5(6)(1983). Rule 5 is to be read in conjuction with Rule 13 of the Rules of Criminal Procedure. Rule 13 governs the discovery process in criminal matters and provides that:

> When a witness subpoenaed by the prosecuting attorney pursuant to Rule of Criminal Procedure Five (5) is summoned by the prosecuting attorney after complaint, indictment, or information, the defendant shall have a right to be present and have the opportunity to cross-examine any witnesses whose appearance before the county attorney is required by this rule. [Ia. R. of Crim. P. 13(1)(1983).]

Shortly before trial the state presented an order to Judge Engelkes for signature which required the Black Hawk County Sheriff's Department to transport an inmate from the men's reformatory for purposes of questioning by the county attorney. Judge Engelkes was not the judge to whom the case was

specially assigned; however, he signed the order on an ex parte basis. The inmate was listed as a defense witness, one James Baych, who was subsequently questioned by the county attorney outside the presence of defense counsel and defendant. Just prior to jury selection in this case, defense counsel brought this matter to the attention of the trial court. He asserted both that the order should not have been entered on an ex parte basis and that he was entitled to be present at the questioning. He asked that discovery sanctions be imposed because of this incident, and that as a result the case should be dismissed. The prosecutor indicated to the court that he believed that the copy of the order would be received by defense counsel prior to the questioning of the witness and that the order had been presented to Judge Engelkes through oversight. He also stated that the witness had not been subpoenaed and that the witness seemed to know nothing about anything in the case. As a result of the witness' lack of knowledge, no statement was taken, but only an oral examination was conducted.

The court stated that it believed the procedure was improper, but that under the circumstances no sanction was warranted.

Defendant has not alleged that the prosecutor learned anything from this witness which was used against him at trial. In fact this witness was not called as a trial witness by either the state or the defendant.

Authority for sanctions against a party that violates a discovery rule exists in Iowa Rule of Criminal Procedure 13:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Ia. R. of Crim. P. 13(6)(c)(1983). This rule gives the trial court much discretion in

determining an appropriate remedy for violation of a discovery rule. State v. Leto, 305 N.W.2d 482, 489 (1981). In exercising its discretion, "the court should take into account the reasons why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." 1 C. Wright, Federal Practice and Procedure § 260 at 533 (1969). Ordinarily an abuse of discretion will not be found unless the party whose rights have been violated suffers prejudice that is not cured by a suitable sanction. See State v. Fryer, 226 N.W.2d 36, 39-40 (Iowa 1975); 1 C. Wright, supra, § 261 at 534.

In the present case, the defendant has not shown any prejudice that resulted from the prosecuring attorney's violation of the discovery rules. Therefore, there was no abuse of discretion by the trial court in not imposing discovery sanctions upon the state.

IV. WHETHER THE STATE FAILED TO CARRY THE BURDEN OF PROOF PURSUANT TO SECTION 724.4 OF THE CODE OF IOWA, 1983, AND WHETHER THE COURT ERRED IN SUBMITTING AN INSTRUCTION ON THE CRIME OF CARRYING A WEAPON.

The defendant alleges that the law requires the prosecution to prove that the defendant does not fall within the exceptions to Section 724.4, Code of Iowa (1982). One of these exceptions involves the issuance of a permit which will obviate the violation of Section 724.4 for carrying a concealed weapon.

The Iowa Supreme Court has addressed this issue, and their opinion in State v. Bowdry, 337 N.W.2d 216 (Iowa 1983) controls the situation presented us on appeal. The court concluded that the legislature did not intend to make the absence of a permit an element of the offense which the prosecution would have the burden of proving beyond a reasonable doubt. Id. at 218. The issue of whether a defendant had a permit to carry a weapon does not enter a case until substantial evidence is presented from some quarter indicating that a defendant had a valid permit at the time of the crime. Bowdry , supra at 217.

There was no substantial evidence presented in this case to make issue of absence of a permit. The state did not have to prove absence of a permit as an element of the offense charged pursuant to Code of Iowa section 724.4. Accordingly, we do not reach the issue of whether the court erred in submitting an instruction on the charge.

Finally, while we appreciate the extensive authority that defense counsel has cited in support of his arguments on appeal, we call his attention to Rule of Appellate Procedure 14 and caution him to refrain from indicating to us that all of his cited authority is "the most pertinent and convincing." R. of App. P. 14(a)(3)(1983).

AFFIRMED.