IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICHARD WAYNE WAGGONER,

Defendant-Appellant.

Filed April 20, 1988

8-37
87-262

Appeal from the Iowa District Court for Mahaska County (No. 5478) - James P. Rielly, Judge.

Defendant appeals his conviction, following a jury trial, for second-degree burglary. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Charles A. Stream, County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Following a jury trial, defendant, Richard Wayne Waggoner, was found guilty of second-degree burglary in violation of Iowa Code sections 713.1 and 713.5 (1985). The trial court sentenced defendant to a term of imprisonment not to exceed ten years.

On appeal from his convictions and sentence, defendant asserts two grounds for reversal: (1) the trial court abused its discretion in overruling defendant's pretrial motion for change of venue, and (2) the trial court erred in overruling defendant's motion for new trial on the ground of juror misconduct. We affirm.

Defendant was accused of breaking into an apartment with a friend, Jerry Wells, and assaulting the resident, Mark Ford, as part of an ongoing feud. Defendant testified he went to Ford's apartment around 2:00 or 3:00 a.m. to talk to Ford. Defendant further testified that when Ford would not come out, defendant and Wells started to leave. Defendant contends Ford then came out, stabbed defendant in the back, and went back inside. At this point, defendant admits, he kicked in the apartment door. Defendant testified he never entered the apartment because Ford came out with the knife again and cut defendant's hand. Defendant and Wells then ran from Ford.

Ford testified his two assailants kicked in the door and entered the apartment. Ford claims he armed himself with a meat cleaver for self-defense. The first officer to arrive at the scene followed a trail of blood from the parking lot to the landing in front of Ford's apartment. The officer observed blood in the apartment and on Ford, but it was not Ford's blood as Ford had no injuries. The jury found defendant guilty of second-degree burglary.

I.

Defendant claims the trial court abused its discretion in overruling his pretrial motion for change of venue. See Iowa R. Crim. P. 10(10)(b).

Defendant, who was incarcerated pending trial in this matter, allegedly escaped from the county jail with two other prisoners on November 28, 1986. The three men stole a truck and then stole a car in Iowa and drove to Tennessee. One of the escapees, who like defendant was from Oskaloosa, was arrested in Tennessee while the three men were attempting to rob a gas station. He committed suicide in a Tennessee jail. Defendant and the other escapee were recaptured in Texas on December 2, 1986.

Defendant requested a change of venue on December 31, 1986. The trial court overruled defendant's motion for change of venue, noting the publicity did not discuss the burglary charge at issue and was mainly about the escape and the suicide. Trial commenced January 13, 1987. The court took precautionary measures during voir dire by questioning out of the presence of the jury panel the only prospective juror who specifically remembered reading about the case. That juror was subsequently excused upon defendant's challenge for cause.

A defendant seeking reversal of a conviction on the basis of a denial of a motion for change of venue must show either actual prejudice on the part of the jury or must show that the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed. State v. Wilson, 406 N.W.2d 442, 445 (Iowa 1987) (quoting State v. Robinson, 389 N.W.2d 401, 403 (Iowa 1986)).

We review the record de novo. Id. Media accounts that are factual and informative in tone do not support a claim that they must be presumed to have created prejudice against a defendant. Id.; State v. Spargo, 364 N.W.2d 203, 208 (Iowa 1985).

We find the publicity, which consists mainly of four articles in the Oskaloosa Herald, was factual in tone, with one exception, and was not inflammatory. The articles ran approximately from September 7 to December 3.

The single nonfactual report involves coverage of the Mahaska County sheriff's statement concerning the severity of the alleged crimes committed by the escapees. The sheriff was quoted as saying, "They suddenly went from wading in the kiddie pool to diving in some deep water." We believe this nonfactual report does not rise to the level of pervasive and inflammatory publicity that would deny defendant a fair trial on the burglary charge. See Wilson, 406 N.W.2d at 445 (media report of sheriff's statement jail escapee Wilson was "one of the most dangerous inmates we've had here" not cause for change of venue in trial for crime unrelated to escape). Cf. Robinson, 389 N.W.2d at 403 (county saturated with media reports strongly suggesting defendant's involvement in attempted murder with which he was charged; held, trial court abused its discretion in denying motion for change of venue). Defendant fails to show either actual prejudice or that prejudice must be presumed as a result of publicity attending his case.

We find the trial court did not abuse its discretion in overruling defendant's motion for change of venue. Defendant failed to show that such degree of prejudice existed in Mahaska County that he could not receive a fair and impartial trial.

II.

Defendant contends the trial court erred in overruling his motions for mistrial and for new trial on the ground of juror misconduct. He alleges three instances of juror misconduct.

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 as to 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 deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. State v. Powell, 400 N.W.2d 562, 564 (Iowa 1987); State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). A person claiming prejudicial misconduct has the burden of proving it by competent evidence. Powell, 400 N.W.2d at 564. The trial court has broad discretion in ruling on issues of jury misconduct. Cullen, 357 N.W.2d at 27.

(a) A member of the community who was observing the trial submitted an affidavit that she overheard two jurors talking in a public restaurant during a lunch break. One juror stated "I don't know him but I know her and her mother." The affiant presumed the juror was referring to defendant's parents. The jurors then discussed the fact defendant and two other men had escaped from jail and were recaptured while defendant was awaiting trial in this case.

While it is clear the jurors' actions amounted to misconduct in that they violated the court's admonition not to discuss the case until it was submitted, see Iowa R. of Crim. P. 18(5)(d), the record before us is barren of any evidence suggesting this juror misconduct was calculated to or in fact did influence the jury's verdict. See State v. Misner, 410 N.W.2d 216, 221 (Iowa 1987) (during trial jurors read newspaper report about trial and talked with other jurors about report). Defendant's motion for mistrial arising out of this asserted misconduct was properly denied by the trial court. Id.

(b) After closing argument but before deliberations began, defendant moved for a mistrial on the ground one of the jurors appeared to be sleeping

for approximately five minutes during defendant's closing argument. We find defendant has failed to show any reasonable probability the alleged juror misconduct was calculated to, and with reasonable probability did, influence the verdict. See State v. Cuevas, 281 N.W.2d 627, 632 (Iowa 1979) (two jurors observed sleeping).

The trial court did not abuse its discretion in overruling defendant's motion for mistrial based upon this alleged juror misconduct.

(c) An affidavit from one of the jurors states in relevant part

> [t]hat on the third and final day of the trial the jury foreman told the other jurors and myself that he had gone out to the Santa Clara apartments on the night of January 14, 1987 (the second day of trial) in order to view the scene of the crime. He told the members of the jury about the apartment building, and even discussed various marks and nicks he had found in the hallway. He drew a diagram of the building on the chalkboard in the jury room. Finally, I believe he made references to a conversation he may have had at the apartment complex with a janitor.

We consider only that part of the affidavit that consists of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. See State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984).

It is conceded that the visit to the scene of the alleged crime by the juror who did so was inappropriate and constituted misconduct. See State v. Little, 164 N.W.2d 81, 83 (Iowa 1969); Mead v. Scott, 256 Iowa 1285, 1290, 130 N.W.2d 641, 644 (1964). We do not condone the irresponsible conduct of jurors who blatantly ignore the court's admonitions. Resolution of this matter, however, is largely discretionary with the trial court, whose holding will not be set aside on appeal except upon a showing of an abuse of discretion. Little, 164 N.W.2d at 83. We find no such abuse here. Cf. King v. Barrett, 185 N.W.2d 210, 213 (Iowa 1971) (new trial should have been granted in auto case where juror test drove road and made observations at variance with those of witnesses who testi-

fied); Skinner v. Cron, 206 Iowa 338, 340-41, 220 N.W. 341, 342 (1928) (case remanded for new trial; jurors viewed scene and concluded eyewitness could not have seen the accident from where she testified she was located).

The affidavit fails to show a reasonable probability, as our decisions require, that the unauthorized view of the premises influenced the verdict. Our decisions demonstrate the reasonable probability requirement is not easy to satisfy. Cullen, 357 N.W.2d at 28. The affidavit does not give the substance of the discussion, if any, generated by the foreperson's relating what he saw at the scene of the alleged crime. The fact he "discussed various marks and nicks he had found in the hallway" would tend to support, rather than refute, defendant's contention he never entered Mark Ford's apartment. See, e.g., State v. Feddersen, 230 N.W.2d 510, 514 (Iowa 1975) (juror's excursion-related conclusions may have aided defendant's testimony); Mead v. Scott, 256 Iowa at 1291, 130 N.W.2d at 644 (affiant's impression of scene was favorable to appellant).

The trial court in the exercise of its broad discretion could examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses, and the issues presented before making a commonsense evaluation of the alleged impact of the juror misconduct. See State v. Christianson, 337 N.W.2d 502, 506 (Iowa 1983).

We find the trial court did not abuse its broad discretion in overruling defendant's motion for new trial. Harrington, 349 N.W.2d at 763.

Finding no ground on which to reverse, we affirm the judgment of the trial court.

AFFIRMED.