FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

HARLAN RICKY ELLIOTT,)

Defendant-Appellant.)

Filed August 29, 1985

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5-182
84-1372

Appeal from the Iowa District Court for Marshall County - Carl D. Baker, Judge.

Defendant appeals his conviction and sentence for second degree arson. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Donielson, and Schlegel, JJ.

Defendant, Harlan Elliott, appeals his conviction of second degree arson, in violation of Iowa Code sections 712.1 and 712.3 (1983). He argues that the trial court erred: (1) in refusing to submit a requested jury instruction on impeachment by contradictory statements, and (2) in denying a motion for new trial based upon a bailiff's remark to some jury members. We affirm.

Our scope of review in this action is on assigned error. Iowa R. App. P. 4.

I. **Jury Instruction.** During the trial officer John Roupp testified for the prosecution. Upon cross-examination, it was established that Roupp's testimony was not identical to statements he had made in his written report of the events in question. Elliott argues that the cross-examination provided a basis for submission of a jury instruction on impeachment by contradictory statements, Uniform (Civil) Jury Instruction 1.10 (1974), and that the trial court erred in refusing to submit the instruction. We disagree.

The instruction itself and the case law upon which it is based incorporate the concept of materiality. See Uniform (Civil) Jury Instruction 1.10 (1974) ("... statements ... materially at variance ...."); State v. Powell, 237 Iowa 1227, 1245-46, 24 N.W.2d 769, 780 (1946). The contradictions established on cross-examination did not in any way alter the thrust of Roupp's testimony. The statements could not be found to be materially at variance. Therefore, the trial court's refusal to give the instruction was proper.

II. **Motion for New Trial.** Before a verdict had been reached, a bailiff entered the jury room. He remarked to a few of the jurors that he knew what they were in there for, and that he had heard this before.

Elliott moved for a new trial on the basis of misconduct by the bailiff. Elliott argued that the statement impermissibly informed the jury that he had been tried previously and that the first trial ended in a hung jury. See Iowa R. Crim. P. 23(2)(d). The trial court denied his motion. He appeals that denial.

In State v. Lampman, this court stated:

> The trial court is given substantial discretion in determining the significance to the outcome of a basis of misconduct by officers of the court, parties to the case, or members of the jury. State v. Sharpe, 304 N.W.2d 220, 226 (Iowa 1981), State v. White, 223 N.W.2d 173, 177 (Iowa 1974), State v. Jackson, 195 N.W.2d 687, 690 (Iowa 1972). A conviction should be reversed because of misconduct by officers of the court or parties to the case only if the misconduct probably influenced or prejudiced the jury against the defendant. State v. Poffenbarger, 247 Iowa 552, 556-57, 74 N.W.2d 585, 587 (1956). . . . Unless abuse of discretion appears, . . . an appellate court will not ordinarily disturb the ruling on a motion for new trial based on a misconduct ground. State v. Poffenbarger, 247 Iowa at 556-57, 74 N.W.2d at 587.

342 N.W.2d 77, 79-80 (Iowa Ct. App. 1982).

It is not probable that the bailiff's statement influenced or prejudiced the jury against Elliott. The statement was ambiguous and was only heard by a few members of the jury. Even if those jurors inferred from the statement that there had been a prior trial with a hung jury, their belief would not likely be prejudicial. We find no basis for concluding the trial court abused its discretion.

AFFIRMED.