IN THE COURT OF APPEALS OF IOWA

No. 1-341 / 90-1211

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STATE OF IOWA,

Appellee,

vs.

RICK L. HOLLAND,

Appellant.

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Holland appeals his convictions, following a jury trial, for two counts of second-degree burglary and one count of attempted burglary. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

A citizen observed Rick Holland looking into two parked cars and making hand motions of some sort near the door of one of the cars, a Cadillac. The citizen called police, who then apprehended Holland while he was still in the vicinity of the two cars. The Cadillac had scratch marks on its window, although it had not been entered. A subsequent investigation revealed Holland's own car, which was parked nearby, contained items stolen from two other cars in the vicinity. Holland claimed he had purchased these items that evening from a stranger who was selling things out of the trunk of a car and that he approached the Cadillac only to admire it. Holland was charged with two counts of burglary in the second degree and one count of attempted burglary.

I.

In this appeal we must determine if the inadvertent inculpatory information acquired by the jury requires a reversal of defendant's conviction of two counts of burglary in the second degree and one count of attempted burglary. The defendant, Holland, was found guilty of those counts by a jury trial and was sentenced to two terms of ten years and one term of five years. Holland has appealed those convictions and sentences. He claims there was insufficient evidence to convict him, certain tools found in his car should have been excluded from evidence, and the court should have granted him a mistrial because of

certain inculpatory evidence that was improperly examined by the jury. We first address the third contention because we believe that upon that ground we must reverse the convictions and remand the case for a new trial.

During the trial the prosecutor offered the defendant's wallet as an exhibit. Neither Holland's counsel nor the prosecutor was aware that among the documents in the wallet was a work release card issued by the Iowa Department of Corrections to Holland indicating that he had a prior conviction and incarceration with the department of corrections. Following the jury deliberations and the reporting of the verdict, a juror asked both defense counsel and prosecutor if the jury would be recalled to make a determination whether the defendant was an habitual criminal. He advised the attorneys that the jury had discovered a work release card in the defendant's wallet. On the basis of that information, Holland's counsel filed a motion for new trial. The trial court overruled the motion with the observation that "the evidence was overwhelming concerning the defendant's guilt." On that basis the court ruled the error created by the inadvertent introduction of the work release card did not cause prejudice to the defendant.

A. This is an issue of first impression in Iowa. Both parties cite the Iowa case of State v. Beeman, 315 N.W.2d 770 (Iowa 1982). That case does not address the issue before us. In Beeman, the supreme court approved the

handling of certain documents found in a properly admitted purse. Id. at 773-74. The documents could not be described as inculpatory to the defendant. In fact, the documents added strength to the alibi defense asserted by the defendant. They tended, without further explanation, to cast doubt upon the defendant's guilt.[1] The State moved either to reopen the evidence or for a mistrial. Id. at 773. The court denied the reopening of the evidence because the defendant objected. Id. Further, the court overruled the State's motion for a mistrial. Id. The supreme court affirmed the trial court, noting its discretion to allow evidence and that there was no prejudice to the defendant. Id. at 774. In our present situation, the documents are inculpatory to the defendant.

The principles involved in this issue are stated by the United States Circuit Court of Appeals for the Fifth Circuit in the case of Farese v. United States, 428 F.2d 178, 179-82 (5th Cir. 1970). The court stated the questions presented were: (1) Was error committed when money, the existence of which was unknown to the court, to the government, or to the defense, was discovered by the jurors in a shirt that had been introduced as a part of a

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1. The State's case alleged the death of the murder victim on April 21, while a bank deposit slip found in the purse indicated the victim had made a bank transaction on April 22. The defendant had a verified alibi for the period from April 22-26. The opinion in that case refers to a deposition that is not a part of the record, which explains that the transactions occurred after three o'clock p.m., and therefore were postdated to April 22.

composite exhibit?; and (2) If this is error, did it prejudice the appellant so as to require reversal and a new trial? Id. at 179.

First, on the issue of whether it was error, the court noted:

> This requires an examination of some of the historical prerequisites of a fair trial. It is a fundamental principle that the government has the burden of establishing guilt solely on the basis of evidence produced in the courtroom and under circumstances assuring the accused all the safeguards of a fair trial. Trial jurors have no right to investigate or acquire information relating to the case outside of that which is presented to them in the course of the trial in accordance with established trial procedure. Indeed, Mr. Justice Holmes expressed this concept over sixty years ago in the following language:
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> > The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, * * *.

Id. (citing Patterson v. Colorado, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907)). That court further found this issue involves the sixth amendment guarantee that the accused shall enjoy the right to a trial by an impartial jury and shall be confronted with the witnesses and evidence against him. Id. at 179-80. It indicated the exposure of secreted material is not subject to the safeguards guaranteed by the constitution and held the discovery by the jurors of the money, in that case, was error. Id. at 180. Second, concerning the issue of prejudice, the court stated: "the courts will not

speculate as to the amount of prejudice arising from information secured by a jury outside the courtroom." Id.

Further considering the prejudice issue, the Farese court referred to a case with a jury discovery similar to that in the case under consideration. See United States v. Dressler, 112 F.2d 972 (7th Cir. 1940). In that case, the defendant's fingerprint card was admitted to prove fingerprints. It was discovered later to contain the accused's criminal history on the reverse side. This discovery was held to be reversible error "as it was not possible to estimate what effect such material had on the jury." Farese, 428 F.2d at 181 (emphasis added). Further, the Farese court stated:

> The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused free from bias, passion, or prejudice. * * * And where error occurs which, within the range of reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. Braswell v. United States, 200 F.2d 597, 602 (5th Cir. 1952).
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> So to hold would, as a practical matter, take from a defendant his right to a fair trial. Little v. United States, 73 F.2d 861, 866 (10th Cir. 1934).

Id. at 180.

The Arizona Court of Appeals considered a similar problem in the case of State v. Pawley, 123 Ariz. 387, 390-93, 599 P.2d 840, 843-46 (Ariz. Ct. App. 1979). In that case, a plastic bag containing letters was admitted in the evidence. Id. at 390, 599 P.2d at 843. The jury took

the bag to the jury room. Looking at a letter inside the sealed bag it could be read: "The grass is cool, but I . . ." Id. at 392, 599 P.2d at 845. The jury sent a note asking the judge if it could look at the contents of the sealed plastic container, and the judge, believing he had no discretion to refuse the request once the exhibit was in the jury's hands, permitted the examination. Id. at 389-90, 599 P.2d at 842-43. The court of appeals held the trial court did possess the discretion to refuse or to remove the exhibit from the jury. Id. at 390, 599 P.2d at 843. The court's refusal to allow an in-camera examination of the exhibit was error. Id. at 392, 599 P.2d at 845. Further, the court held the error was prejudicial since it destroyed the defense being made by the defendant and was not a proper part of the evidence. Id. at 845-46, 599 P.2d at 392-93.

In People v. Hanson, 83 Ill. App. 3d 1108, 1109, 404 N.E.2d 801, 803 (1980), the victim of an armed robbery was cut with a razor blade. In the process of a scuffle, the victim's money was stolen. The defendant's coat was admitted into evidence, and while the jury was deliberating, it found two bills, one of which bore evidence of having been cut. Id. at 1111, 404 N.E.2d at 804. The court of appeals held it was reversible error for the jury to have considered the presence of such money. Id. at 1112, 404 N.E.2d at 805. The court held: "It is well settled that where exhibits have not been introduced

into evidence it is error to permit the jury to take them to the jury room." Id. at 1111, 404 N.E.2d at 804. The court held the existence of cut currency in the defendant's coat pocket may have destroyed her defense that her sister took the money and that she did not share in the proceeds of the crime.

The official court file of the case was left in the jury room for four hours in United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979). The file contained many prejudicial matters. The trial court was satisfied the jury had not relied upon the file for its decision, even though it had been circulated among the jurors and they had read parts of the documents in it. The appellate court said:

> The Government concedes that the file contained prejudicial information. Our inquiry is to determine whether this admittedly prejudicial extrinsic evidence prevented the defendant from receiving a fair trial (citation). In determining this, the actual impact upon the jury of such evidence cannot be accurately measured or ascertained (citation). Consequently, it is a useless exercise even to ask jurors whether such evidence in fact affected their verdict. As stated in Braswell v. United States, 200 F.2d 597, 602 (5th Cir. 1952):
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> > The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. * * * And where error occurs which, within the range of a reasonable possibility may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.

Vasquez, 597 F.2d at 193.

The court recognized it was the first time the ninth circuit had been confronted with a criminal case where extrinsic prejudicial evidence had been taken into the jury room. Stating that other circuits had addressed the issue, it noted:

> Similarly, we hold that the appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict.

Id. (citations omitted).

The test to determine prejudice varies between the circuits. The Vasquez court pointed out that in the second, tenth, and D.C. circuits, the test was: "If there is the 'slightest possibility' that harm could result, then reversal is required." United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973), cert. denied, 416 U.S. 986, 94 S. Ct. 2391, 40 L. Ed. 2d 764 (1974); Dallago v. United States, 427 F.2d 546, 560 (D.C. Cir. 1969); United States v. Adams, 385 F.2d 548, 550-51 (2nd Cir. 1967). The seventh and eighth circuits have used the test: "might have operated to the substantial injury of the defendant." Osborne v. United States, 351 F.2d 111, 119 (8th Cir. 1965); United States v. Grady, 185 F.2d 273, 275 (7th Cir. 1950). As in Vasquez, a number of fifth circuit cases established "if there is a 'reasonable possibility' that the error affected or prejudiced the verdicts, then reversal is required." United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975); Paz v. United States, 462 F.2d

740, 746 (5th Cir. 1972); Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970).

B. As noted earlier, we find no Iowa cases directly on point. In State v. Beeman, 315 N.W.2d 770, 773 (Iowa 1982), material that was found in the properly admitted exhibit was exculpatory to the defendant. In the case at bar the work release card was inculpatory. Because the facts of this case involve conduct of the jury following the discovery of the card, we look to the line of Iowa cases relating to jury misconduct for guidance.

In dealing with claims of jury misconduct "there are two basic problems: the procedural problem of proving the facts as to what happened, and the substantive problem of the effect of the facts which were proven." Harris v. Deere & Co., 263 N.W.2d 727, 729 (Iowa 1978). Iowa cases have stated that we must apply an objective rather than a subjective test in evaluating the asserted misconduct, Id. at 730-31; State v. Hahn, 259 N.W.2d 753, 757 (Iowa 1977), and in determining whether a reasonable probability exists that it influenced the verdict. State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984); State v. Christianson, 337 N.W.2d 502, 506 (Iowa 1983); State v. Cuevas, 288 N.W.2d 525, 535 (Iowa 1980); Harris, 263 N.W.2d at 730-31.

Those cases, however, do not give guidance on how to apply an "objective test" in evaluating the asserted misconduct and making an objective determination whether the misconduct influenced the verdict. An analysis of the

earlier cases reveals the court considers only objective facts (as they are defined by the cases) in making the determination whether misconduct has occurred. The supreme court in Ryan v. Arneson, 422 N.W.2d 491, 495 (Iowa 1988), adopted the federal rule and held jurors "incompetent to testify to any matter or statements occurring in the course of deliberations." This rule protects each of the components of deliberation "including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." Id. It is clear from this language that we consider only objective facts in determining if jury misconduct has occurred and whether there is a reasonable probability that it influenced the verdict. Once the objective facts have been determined, it is necessary to make a subjective judgment from the evidence and all other factors whether the misconduct has influenced the verdict. The effect upon the verdict is a matter that cannot be determined with any kind of objective precision. It is undoubtedly for that reason we hold trial courts have broad discretion in ruling on motions predicated on jury misconduct. Our supreme court has stated:

> Trial court has broad discretion in determining whether evidence of claimed jury misconduct justifies a new trial.
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> . . . Trial court's holding will not be set aside on appeal except upon showing an abuse of such discretion.

Harris, 263 N.W.2d at 729 (citing State v. Houston, 209 N.W.2d 42, 44 (Iowa 1973)).

If we endeavor to decide this case as a case involving a claim of jury misconduct, we must first determine the objective facts which are claimed to constitute jury misconduct. In this regard, we have the agreed facts by both defense counsel and prosecutor that neither knew of the existence of the work release card in the wallet. Both agree it was not a proper exhibit nor intended to be a part of the proper exhibit and that it was improper for it to be in the hands of the jury. The only argument the State makes in justification of the court's failure to grant a new trial is that the court was justified in finding that overwhelming evidence of defendant's guilt existed such as to show that the improper evidence was not prejudicial.

Holland furnished no affidavits to show what occurred in the jury room. Such affidavits would not be permitted to show what occurred. Ryan, 422 N.W.2d at 495. In addition, these affidavits are unnecessary. Both counsel agree that the juror who reported the existence of the card inquired if the jury would be recalled to decide if Holland was an habitual criminal. Based upon these agreed facts, we are able to determine if Holland was prejudiced by the card being available to the jury.

What discussion occurred within the jury room cannot be the subject of our inquiry. Id. Such inquiry is unnecessary in this case. Any discussion of the work

release card exceeded tolerable bounds of jury deliberation. Harris, 263 N.W.2d at 730. Under the authorities, we should grant a new trial because of jury misconduct if we find such misconduct occurred and there was a reasonable probability it influenced the verdict. We find that with the expressed belief that the jury might have to decide the habitual criminal issue, it is reasonably probable the misconduct influenced the verdict.

Trial courts possess "broad discretion" in deciding whether evidence of alleged jury misconduct warrants a new trial. An abuse of discretion is not found unless "such discretion was exercised on grounds . . . or to an extent clearly unreasonable." Harrington, 349 N.W.2d at 762 (citation omitted). We believe the court abused its discretion in finding there was a reasonable probability the misconduct did not influence the verdict. While we hold later in this opinion the verdict was supported by sufficient evidence, we do not agree with the court's characterization that the evidence of defendant's guilt was overwhelming. There was substantial circumstantial evidence. We are unable to speculate, however, upon the effect of the work release card upon the deliberation of the jury. On this issue, we reverse the convictions and remand the case for a new trial.

II.

Holland claims the court should have directed a verdict of acquittal in the case because there was insufficient

evidence to support his conviction. Because the evidence may be substantially the same in a second trial, we will discuss this issue in this appeal.

In reviewing claims of insufficiency of evidence, we review the evidence in the light most favorable to the State. State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988). This includes the making of any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). The reviewing court must consider all of the evidence and not just the evidence which supports the verdict. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Evidence is substantial if it could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. LaPointe, 418 N.W.2d at 51.

We have reviewed the record in detail and find the evidence, though mostly circumstantial, is substantial and is sufficient to support the convictions. See Iowa R. App. P. 14(f)(16) (direct and circumstantial evidence are equally probative). We affirm the trial court on this issue.

III.

Holland's sole remaining ground for reversal is the claim of error in admitting certain tools found in defendant's car. The admissibility of evidence is within the discretion of the trial court. State v. Brewer, 247 N.W.2d 205, 214 (Iowa 1976). On appeal, the trial court's

ruling on admissibility will be reversed only upon a showing of an abuse of discretion. Id.; State v. Butler, 415 N.W.2d 634, 636 (Iowa 1987).

The trial court's reasoning for admitting the tools appears in its ruling on defendant's motion in limine to avoid the admission of those items. There the court said:

> I think under the circumstances that the jury should be entitled to hear the result of the search [of Holland's car] and make their [sic] own determination based on all the facts and circumstances of whether or not these were articles which may have tended to be used by the defendant in either the perpetration of this or any other burglary.

From this ruling, the court believed that it was for the jury to decide what weight should be given to the items. We believe the allowance of the tools into evidence was within the sound discretion of the trial court. We affirm the trial court on this issue.

IV.

Having reversed the convictions on the basis of the inadvertent but improper inclusion of the inculpatory matter referred to in the first part of this opinion, we remand the case to the trial court for a new trial.

REVERSED AND REMANDED.