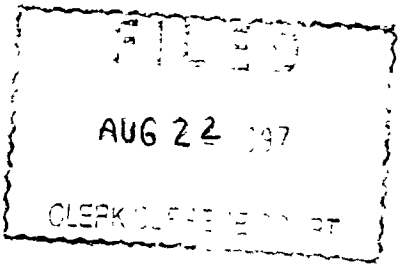
**IN THE COURT OF APPEALS OF IOWA** 000393

No. 7-345 / 96-957




**STATE OF IOWA,**

Appellee,

**vs.**

**DAVID ALLEN WESTERHOLM,**

Appellant.

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Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Appellant appeals from the judgment and sentence entered upon his conviction of first-degree arson in violation of Iowa Code section 712.1 (1993). **AFFIRMED.**

Ronald L. Ricklefs, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, P.J., and Streit, and Vogel, JJ.

**CADY, P.J.**

David Allen Westerholm appeals his conviction, following a jury trial, for first-degree arson. Westerholm argues there was insufficient evidence to sustain the elements necessary to support the arson conviction. He also claims the district court erred in overruling his motion for mistrial based on juror misconduct and alleged polling of the jury during deliberations. We affirm.

The State charged Westerholm and Christine Hager with first-degree arson in violation of Iowa Code section 712.2 following a fire at a mobile home they occupied with Hager's son. Three trials followed. At the first trial, a witness subpoenaed by Westerholm failed to appear and the trial court granted a mistrial. The jury failed to reach a verdict following the second trial. The third trial resulted in the conviction.

Westerholm and Hager testified they were in bed sleeping when they heard noises and the sound of breaking glass. By the time they left the bed and opened the bedroom door, there was enough smoke in the hallway to fill the entire bedroom. Westerholm, Hager, and Hager's son escaped to safety by climbing out of their respective bedroom windows.

Evidence presented at trial included expert testimony concerning the cause and origin of the fire. The State's and Westerholm's expert witnesses disagreed as to whether an occupant of the mobile home had started the fire. The State's expert witness, a captain on the Cedar Rapids fire department, felt one of the occupants of the mobile home had started the fire because the time required for the hallway to fill

with smoke was too long to be reconciled with the testimony of Westerholm and Hager. The opinion was supported by the absence of smoke damage in the bedroom, which would have been evident if the bedroom had filled with smoke when the door was opened.

In contrast, Westerholm's expert witness, an engineering consultant, felt it could not be determined whether the fire was started by someone inside or outside the mobile home. His opinion was based on the presence of clean, mechanically fractured glass on the outside of the home which could have resulted from someone breaking the window from either the outside or the inside.

Westerholm and Hager were found guilty of first-degree arson following jury deliberations at the close of the third trial. Westerholm filed post-trial motions asserting the trial court erred by inadvertently providing the jury with a magnifying glass and by asking the jury if a verdict could be reached if additional time was given to deliberate. The trial court denied the motion and sentenced Westerholm to an indeterminate twenty-five year prison term.

Westerholm appeals. He claims the evidence was insufficient to support his conviction for first-degree arson. He further argues the trial court erred in denying his motions for mistrial based on the use of the magnifying glass by the jury and the inquiry of the jurors by the trial judge. Finally, Westerholm asserts information has come to light since sentencing indicating trial counsel may have had a conflict of

interest in representing both defendants. He requests this issue be preserved for postconviction relief proceedings.

**I. Sufficiency of Evidence.**

Our standard of review for claims of insufficient evidence is well established. When a criminal defendant challenges the sufficiency of the evidence, all of the evidence in the record is reviewed in a light most favorable to the State. *State v. Jordan*, 409 N.W.2d 184, 184 (1987). We are bound by the jury's verdict when it is supported by substantial evidence. Iowa R. App. P. 14(f)(1). Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993).

Arson is committed when any person, having the intent to destroy or damage property, causes a fire in or near the property. Iowa Code § 712.1. Westerholm maintains the evidence as a whole is insufficient to support a finding he caused the fire or intended to damage property. He acknowledges the presence of a person in the property at the time of the fire could reasonably have been anticipated. *See* Iowa Code § 712.2.

The State asserts there was evidence from which the jurors could conclude Westerholm set the fire intending to destroy or damage the mobile home. Alternatively, the State argues the evidence was sufficient to prove Westerholm aided and abetted Hager in the act.

In examining the evidence, the court gives the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *Conyers*, 506 N.W.2d at 444. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crime. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992).

We find substantial evidence supports the elements of the crime of arson. There was evidence from which the jurors could conclude Westerholm set fire to the mobile home. It was the jury's function to determine whether the evidence was credible. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984). The jury could have rationally concluded the window of the mobile home had been broken from the inside by an occupant of the mobile home and not from the outside by an intruder. There also was evidence from which the jurors could conclude Westerholm's and Hager's version of the events were not true.

The element of intent is a state of mind that is difficult to prove by direct evidence. *State v. Finnel*, 515 N.W 2d 41, 42 (Iowa 1994). Proof of intent, therefore, depends on circumstantial evidence and inferences drawn from it. *Id.* "The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true." *Id.* Here it can be inferred Westerholm intended to destroy or damage the mobile home to collect the insurance proceeds.

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**II. Juror Misconduct**

Westerholm further claims he was entitled to a new trial because the jury was given a magnifying glass during the deliberations. The court attendant provided the jury with a magnifying glass during deliberations after mistakenly believing the trial judge had granted the jury's request for a magnifying glass. The magnifying glass was in the possession of the jury for approximately one hour. Westerholm argues the trial court erred in failing to grant his motion for a new trial based on the alleged misconduct.

A trial court may grant a new trial when the jury "received any evidence, paper or document out of court not authorized by the court." Iowa R. Crim. Proc. 23(2)(b)(9). It may also grant a new trial when any cause exists showing the defendant did not receive a fair trial. Iowa R. Crim. Proc. 23(2)(b)(9). Three conditions, however, must be met to obtain a new trial based on jury misconduct. *State v. Johnson*, 445 N.W.2d 337, 341 (Iowa 1989). First, there must be competent evidence bearing on the misconduct. *Id.* Secondly, the misconduct must exceed the tolerable bounds of jury deliberation. *Id.* Finally, the misconduct must have been "calculated to, and with reasonable probability did, influence the verdict." *Id.*

The trial court has broad discretion in ruling on motions for a new trial based on jury misconduct. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). An abuse of discretion is not found unless the decision was clearly unreasonable. *Id.*

The use of a magnifying glass by a juror during deliberations typically does not constitute misconduct. *See State v. Smith,* 196 Iowa 1003, 1011, 193 N.W. 418, 422 (1923); *see also Barber v. Town of Perry,* 67 Iowa 146, 147-48, 25 N.W. 100, 101-102 (1885). In a practical sense, it is not outside evidence or information but merely a device to enhance the ability of the user to see objects. *Id.* Normally, it would only allow jurors to better examine the trial exhibits. *See Western Spring Service Co., v. Andrew,* 229 F.2d 413, 419 (10th cir. 1956).

Under the circumstances of the case we find no abuse of discretion by the trial court in refusing to grant a new trial based on the use of the magnifying glass by jurors during deliberations. Not only was there no evidence the claimed misconduct exceeded the tolerable parameters of jury deliberations, there was no evidence it influenced the jury. *See Johnson,* 445 N.W.2d at 342.

Notwithstanding, Westerholm asserts his counsel should have developed some record during or after the trial to determine if the use of the magnifying glass in this particular instance rose to an unacceptable level of conduct and improperly impacted the verdict. We are not prepared to hold the unauthorized use of a magnifying glass could never constitute jury misconduct. We also observe there was no inquiry into the incident by the trial court or counsel within the acceptable confines of Iowa Rule of Evidence 606(b). Accordingly, we preserve the potential claim of ineffective assistance of counsel for failing to develop a record on the use of the magnifying glass by the jury.

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**III. Jury Inquiry**

Westerholm further argues he was entitled to a new trial because the trial judge inquired into the status of the deliberations after the jury foreman reported the jury was "deadlocked." He contends the district court improperly influenced the jury when it ordered further deliberations after one of the jurors indicated in response to a question by the court that further deliberations would not help in reaching a verdict. Westerholm relies on the verdict coming within an hour and five minutes of the judge's directive to continue deliberations, together with an affidavit from a juror.

We employ the "totality of the circumstances" standard to determine whether inquiry into the division of a jury was coercive of a guilty verdict . *State v. Cornell*, 266 N.W.2d 15, 19 (Iowa 1978). In *Lowenfield v. Phelps*, the United States Supreme Court held it was not coercive to ask the jury if they could reach a verdict if given additional time. *Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S. Ct. 546, 552, 98 L. Ed. 2d 568, 579 (1988). In reaching its decision, the Court stated there was no reason why those in the minority would conclude further deliberations would not be helpful, or that those in the majority would conclude otherwise. *Id.* Likewise, the Iowa Supreme Court has held the trial court may, after a jury has been deliberating for some time, inquire into the likelihood of a verdict being reached. *State v. McConnell*, 178 N.W.2d 386, 390 (Iowa 1970).

We find no evidence to support Westerholm's contention that ordering further deliberations was coercive. Furthermore, we do not consider the juror affidavit

because evidence of what took place in the jury room will only be considered if outside information or influence is improperly brought to bear on any juror. *See* Iowa R. Evid. 606(b). Here, the court's inquiry did not constitute an improper outside influence. *McConnell*, 178 N.W.2d at 390.

Although a single juror raised his hand in response to the court's inquiry as to whether any juror felt a verdict could not be reached given additional time, this does not establish the numerical division of the jury regarding the guilt of the defendants. *Lowenfield*, 484 U.S. at 240, 108 S. Ct. at 552, 98 L. Ed. 2d at 579. The trial judge in this case did not inquire into the numerical division of the jurors at any point, a procedure which the United States Supreme Court has found to be coercive. *See Brasfield v. United States*, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926). The judge merely asked the jury if additional deliberation time would assist in reaching a verdict. A verdict-urging instruction was not given. *See Lowenfield*, 484 U.S. at 234-35, 108 S. Ct. at 549-50, 98 L. Ed. 2d at 575-76 (jury returned in thirty minutes with a verdict sentencing defendant to death after court had polled the jury twice and offered a verdict-urging instruction); *Cornell*, 266 N.W.2d at 19 (was not reversible error when verdict returned five hours after jury polled as to guilt); *McConnell*, 178 N.W.2d at 390 (several inquires made regarding the likelihood of reaching a verdict). We conclude, after considering all of the circumstances, the district court's inquiry was proper and deny Westerholm's motion for a mistrial.

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**IV. Ineffective Assistance of Counsel**

Westerholm claims he was denied effective assistance of counsel based on the duel representation. Both Westerholm and the State agree the record is insufficient for us to address the claim on direct appeal. We conclude Westerholm's claim of ineffective assistance of counsel should be preserved for postconviction relief proceedings.

**AFFIRMED.**