IN THE COURT OF APPEALS OF IOWA

No. 2-623 / 92-618

FILED
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CLERK SUPREME COURT

DONALD K. WASHBURN and DOLORES WASHBURN,

Appellees,

vs.

SHIRLEY S. FRESHWATERS, Individually, SHIRLEY S. FRESHWATERS, d/b/a STEVENS INVESTMENTS, and JAMES FRESHWATERS,

Appellants.

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

The Freshwaters appeal the district court's order which granted Donald and Dolores Washburn's motion for new trial based upon jury misconduct. **AFFIRMED.**

H. Raymond Terpstra II of Terpstra, Terpstra & Epping, Cedar Rapids, for appellants.

Steven K. Warbasse of Warbasse & Rousch, P.C., Cedar Rapids, for appellees.

Heard by Donielson, P.J., Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

HAYDEN, J.

In this appeal we address whether the trial court abused its discretion in granting a new trial based on jury misconduct.

On November 21, 1990, Donald and Dolores Washburn filed a petition against Shirley and James Freshwaters and Shirley S. Freshwaters, d/b/a Stevens Investments, alleging they had been defrauded in the purchase of real estate from Shirley S. Freshwaters, d/b/a Stevens Investments. The case proceeded to a jury trial on September 9, 1991. The jury returned a verdict against Washburns, and the trial court entered judgment on September 18, 1991.

On December 10, 1991, Washburns filed a petition for vacation of judgment, a motion for new trial, and a motion to stay. Washburns alleged the jury foreman, Michael Tiernan, had engaged in conversations with individuals at a local tavern during the course of the trial and had learned of a prior felony conviction of Donald Washburn. They contended Tiernan's conduct was not discovered until after the judgment was entered. The matter proceeded to a hearing.

At the hearing, Washburns produced evidence which indicated Tiernan had frequented a tavern, the Riverside Steak and Ale, every evening, except one, after the trial recessed for the day and had discussed the case in the tavern with third persons unconnected with the case. During these discussions Tiernan allegedly indicated he did

not get along with Dolores Washburn's counsel and he knew of Donald Washburn's conviction for fraud and forgery. He also stated he knew after the first day of the trial which party was guilty and indicated he leaned "toward the other side" due to his dislike of Dolores' counsel. Additionally, Washburns produced a taped conversation which took place in the tavern between William Wright, an acquaintance of the Washburns, and Tiernan. Wright taped this conversation approximately one month before Washburns filed their motion for new trial. Wright testified he initially entered a discussion with Tiernan about the trial on September 10, 1991. This conversation occurred at the Riverside Steak and Ale tavern during the trial proceedings. Wright testified regarding the specifics of their conversation on September 10, 1991. Wright stated Tiernan's statements on the audiotape were consistent with the statements Tiernan made to him on September 10, 1991. Two other witnesses from the tavern also testified they either overheard Tiernan discussing the case or entered into conversations with him about the case and parties involved.

The trial court then entered its ruling. The court

> was convinced that based upon the evidence and what appears to be a lack of credibility on the part of Tiernan, the conviction of Donald K. Washburn and the trial itself was discussed outside the presence of the Court . . . and that Mr. Tiernan's obvious prejudice rendered it highly improbable that he could sit as a fair and impartial fact finder limited to the evidence presented at trial.

The court stated this finding was confirmed in the taped conversation. The court then concluded it was reasonably probable Tiernan, as foreman, influenced the jury. Accordingly, the court granted Washburns' motion for new trial on the ground of jury misconduct.

The Freshwaters then filed a motion for new trial based on the trial court's failure to admit evidence as to the deliberative processes of some of the jurors. This evidence consisted of affidavits from two jurors in the case. The district court denied the motion. The Freshwaters now appeal.

The trial court has broad discretion in ruling on a motion for new trial based on jury misconduct. State v. Johnson, 445 N.W.2d 337, 341 (Iowa 1989); Harris v. Deere Co., 263 N.W.2d 727, 729 (Iowa 1978). The trial court is better able to appraise the situation and determine if misconduct has occurred. Castner v. Wright, 256 Iowa 638, 652, 127 N.W.2d 583, 591 (1964); Perry v. Cottingham, 63 Iowa 41, 43, 18 N.W. 680, 681 (1884). We are slower to interfere with the grant of a new trial then with its denial. Iowa R. App. P. 14(f)(4). A grant of a new trial will not be disturbed unless an abuse of discretion is shown. "'We do not find an abuse of discretion . . . unless the action of the trial court is clearly unreasonable under the attendant circumstances.'" State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984) (quoting State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984)); see Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990).

Appellants contend the trial court abused its discretion in ordering a new trial based upon juror misconduct. In order to receive a new trial on the basis of jury misconduct, the following conditions must be satisfied:

> "(1) [E]vidence 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."

Johnson, 445 N.W.2d at 341 (quoting Cullen, 357 N.W.2d at 27).

I. **Objective Facts Bearing on Misconduct.** Our courts have held statements made by jurors after deliberations regarding whether they were influenced by certain matters or to what extent they were influenced are incompetent and must be ignored. Id.; Cullen, 357 N.W.2d at 29. In State v. Harrington, the Iowa Supreme Court stated "[a] juror may not by affidavit, testimony or otherwise state what influenced the jury in reaching its decision or verdict, as such showing inheres in the verdict." State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984). Under these principles the trial court properly refused to admit affidavits of two jurors because the affidavits included evidence of the jury's deliberation process.

There is evidence Tiernan disregarded the court's repeated admonitions during the trial about discussing the

case with anyone until a verdict was rendered. Evidence shows Tiernan, during the course of the trial, discussed the case with third persons outside of court. These conversations occurred at the Riverside Steak and Ale tavern. Tiernan was an active participant in the conversations. We conclude Tiernan's statements constituted misconduct. However,

> [a] verdict will not be set aside merely because a juror has, in violation of his sworn duty, talked to persons about the case. It must appear that the misconduct was such as to materially affect the substantial rights of the complaining party.

In re Estate of Cory, 169 N.W.2d 837, 844 (Iowa 1969) (citing Dakovich v. City of Des Moines, 241 Iowa 703, 712, 42 N.W.2d 511, 516 (1950); Foedisch v. Chicago & N.W. Ry., 100 Iowa 728, 731, 69 N.W. 1055, 1056 (1897)); Iowa R. Civ. P. 244. The trial court has considerable discretion in determining whether alleged misconduct was prejudicial. Rancho Grande, Inc. v. Iowa State Highway Comm'n, 261 Iowa 861, 870, 156 N.W.2d 293, 299 (1968). Evidence showed Tiernan learned, during the discussions at the tavern, plaintiff Donald Washburn had a prior felony conviction. The statements made by Tiernan during these conversations indicated his biases. Witnesses testified Tiernan referred to Washburn as a con man and stated his dislike of Dolores Washburn's counsel. They also stated Tiernan made statements indicating how he was going to decide the case himself. Tiernan's misconduct materially affected the substantial rights of Washburns.

II. **Conduct Exceeded Tolerable Bounds of Jury Deliberation.** In order to constitute the type of jury misconduct upon which a court may grant a new trial, the acts of statements complained of must exceed tolerable bounds of jury deliberation. Harris, 263 N.W.2d at 730. A jury must decide a case based on the facts produced at trial. Johnson, 445 N.W.2d at 342 (citing State v. Folck, 325 N.W.2d 368, 372 (Iowa 1982)). Evidence supports Tiernan was biased and knew of Washburn's conviction before a verdict was rendered. Witnesses from the tavern testified Tiernan indicated he had made up his mind on the outcome of the case before the trial ended. Tiernan's actions violated the tolerable grounds of jury deliberation.

III. **Misconduct Influenced Verdict.** To justify a new trial for jury misconduct it must appear, independently of what jurors might later say, the misconduct was calculated to and with reasonable probability did influence the verdict. Johnson, 445 N.W.2d at 342; Cullen, 357 N.W.2d at 29. A party seeking reversal on jury misconduct bears this burden of proof. In determining whether Washburns' satisfied this burden the trial court may "'examine the claimed influence critically in light of all the trial evidence, the demeanor of the witnesses and the issues presented before making a common sense evaluation of the alleged impact of the jury misconduct.'" Johnson, 445 N.W.2d at 342 (quoting State v. Christianson, 337 N.W.2d

502, 506 (Iowa 1983)). Given the evidence of Tiernan's statements and strong biases, the trial court did not err in concluding his misconduct was calculated to, and probably did, influence the verdict. We conclude the trial court's decision, based on Tiernan's role as jury foreman, his statements during trial to third parties, the tape-recorded conversation after the trial, was not an abuse of discretion. We affirm the trial court.

AFFIRMED.