FILED
NOV 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 30, 1983

vs.)

GERALD WILLIAM SUDBROCK, JR.,) 3-284
69398

Defendant-Appellant.)

Appeal from Warren District Court - James W. Brown, Judge.

Defendant appeals from his conviction for assault with intent to inflict serious injury, willful injury, and going armed with intent in violation of Iowa Code sections 708.2(1), 708.4, and 708.8. AFFIRMED.

Charles R. Turner, Des Moines, for defendant-appellant.

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

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Defendant appeals from his conviction for assault with intent to inflict serious injury, willful injury, and going armed with intent in violation of Iowa Code sections 708.2(1), 708.4, and 708.8. He claims that: (1) the evidence was insufficient to support a finding that he possessed the requisite criminal intent; (2) hearsay testimony was improperly admitted; (3) evidence of the seriousness of the victim's wound was insufficient to support a finding of guilt on the willful injury charge; and (4) juror misconduct denied him a fair trial and a new trial should therefore have been granted. We affirm.

Defendant was charged in connection with the shooting of one Allen Miller on October 21, 1981, and filed notice of his intent to rely upon the defense of diminished responsibility. Defendant had become upset and depressed upon discovery that Betti, his wife, had an affair with Miller which resulted in her pregnancy. He testified to the following sequence of events on the day of the child's birth: he took Betti to the hospital, left to eat, drove to a lake area to think, left and asked directions to Miller's home, returned home and obtained a gun he had previously borrowed for hunting purposes, returned to the lake contemplating suicide, and ultimately confronted Miller at his home in order to talk to him. Defendant testified that the gun discharged but he did not recall pulling the trigger. He further testified that he left the scene and went to a tavern without knowing whether Miller had been shot and that he turned himself in later after hearing on a news bulletin that the victim had in fact been shot. One expert witness opined that the time of the shooting defendant did not have sufficient mental capacity to form specific intent and another expert testified concerning his stress and depression and stated that he may have had diminished responsibility. The State's expert expressed the opinion that defendant did not have diminished responsibility. The jury returned a guilty verdict; defendant appeals from the resulting judgment and sentence.

I.

We find no error in the trial court's overruling defendant's motion for new trial on grounds of jury misconduct. The record reflects that one of the jurors did not disclose during voir dire her knowledge of a previous shooting incident involving defendant that had been the subject of a successful pretrial motion in limine. She later testified that in order to make sure that her decision was fair, she disclosed the information to some of the other jurors, some of whom may also have been already aware of the previous incident.

We must first determine whether we may even consider this evidence of alleged jury misconduct and whether it tainted the guilty verdict. In considering what evidence of jury conduct may be used to attack a verdict, our supreme court has distinguished "between inquiries into the internal workings of the jury and external pressures brought to bear on the decision-making process." State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980). Evidence of the internal workings of a jury is inadmissible to attack the verdict; such evidence includes, for example:

> . . . what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, their votes, or other evidence which seeks to show that the actual decision of the jury was, or should have been, something other than what the verdict indicates.

Id. On the other hand, "evidence of external matters improperly brought to bear on the deliberations," such as an experiment performed by a juror or a prejudicial comment made by a bailiff to jurors, may be introduced to attack the verdict. Id. at 916-17.

We believe it is clear that the juror's conduct in this case—relating to other jurors during deliberations that defendant had been involved in another shooting some years before—was an external matter that could be used to attack the verdict. That past incident certainly was not part of the record made at trial; in fact, defendant's pre-trial motion in limine to prevent the State from referring to that incident was sustained.

We do not believe, however, that the facts in this case constitute misconduct requiring reversal and a new trial. "To justify a new trial for jury misconduct it must appear (independent of what jurors might later say) the misconduct was calculated to, and probably did, influence the verdict." State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973); see also State v. Christianson, 337 N.W.2d 502, 504-05 (Iowa 1983). The record indicates that the remark concerning the prior shooting was heard by only two other people, both of whom were already aware of the incident. The remark apparently was made in passing; there is no evidence that it was intended to or did in fact influence the verdict.

The case of State v. Jackson, 195 N.W.2d 687 (Iowa 1972), supports our conclusion. There the court held that jury misconduct was not established where it was shown that the jury had discussed defendant's prior murder conviction for a very short period of time before being admonished by the court not to consider that conviction. Although there was no such admonition in this case with respect to the prior shooting, the record clearly indicates that the few jurors who were aware of it gave it no consideration or weight in reaching the verdict. Defendant's claim of prejudice amounts to no more than mere speculation. "In determining whether the evidence of claimed jury misconduct justifies a trial court in ordering a new trial, the court is vested with broad discretion." Id. at 690. The trial court did not abuse its discretion in overruling defendant's motion in this case.

II.

Defendant next contends that there was insufficient evidence to support the jury's conclusion that he had the requisite intent to commit the crimes for which he was convicted. All three of those offenses are specific intent crimes. Iowa Code SS 708.2(1), 708.4, and 708.8. In considering claims of evidentiary sufficiency, we examine all of the evidence in the record in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Although cognizant of the rather unique factual circumstances in this case, we believe there is sufficient evidence on the issue of intent to support the jury's decision. The State's expert witness testified that, in his view, defendant intended to kill or seriously injure Miller. One of defendant's own experts even testified that, although defendant may have been suffering from diminished capacity, he intended to shoot Miller at the time of the actual incident. The record also indicates that when defendant told Miller that Betti gave birth to the latter's child, Miller did not show any interest, leading to defendant's angered reaction that Miller was merely "using" her. From this and other evidence, a rational jury could reasonably conclude that defendant specifically intended to do what he did.

We also reject defendant's claim that there was insufficient evidence that Miller sustained a "serious injury," an element of assault with intent to inflict serious injury (Iowa Code § 708.2(1)) and willful injury (Iowa Code § 708.4). "Serious injury" is defined in Iowa Code § 702.18 in part as "bodily injury which creates a substantial risk of death or which causes . . . protracted loss or impairment of the function of any bodily member or organ." Miller was shot in the abdomen, had to have three or four inches of his small intestine removed, and did not have the use of his small intestine for three days. Medical testimony indicated that, without medical treatment, Miller would have died five to ten days after the shooting. Under these circumstances, Miller's injury was "serious" under the statutory definition.

III.

Finally, defendant claims that the trial court erred in allowing the State to introduce prejudicial hearsay testimony. We disagree. Without objection, Betti testified that defendant had phoned her and told her he thought he had shot Miller, that he had later told her that he had gone to Lacona to find Miller and wait for him to return home, and that he had not relayed the latter information when he first phoned her at the hospital. Over hearsay objection the prosecutor was

permitted to ask whether she recalled relating the hospital phone call to investigating police officers. She testified that she had no such recollection.

First, we believe it is clear that Betti's challenged testimony was not hearsay. In response to the prosecutor's question whether she told the police about what defendant related to her during the hospital phone call, Betti replied in the negative. Thus, in response to the challenged questions, Betti did not testify to out-of-court statements made by defendant or anyone else to prove the truth of the matter asserted; her denial that she made those statements to the police was not hearsay. See McCormick on Evidence § 246 (2d ed. 1972).

Even if the challenged testimony was hearsay, defendant was not prejudiced. As indicated, Betti had already testified without objection that defendant told her he went to Lacona to wait for and talk to Miller. She also testified without objection that defendant told her that he might have shot Miller. "[A] defendant may not claim prejudice where the same evidence is otherwise supplied by the defendant or is made overwhelmingly clear in the record." State v. Trudo, 253 N.W.2d 101, 108 (Iowa 1977). Any error was harmless.

We find no reason to disturb defendant's conviction. We therefore affirm.

AFFIRMED.

All judges concur, except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent from the majority's holding in Division I. I agree with the conclusion that the comment by one of the jurors that defendant had been involved in another shooting is an external matter that can be used to attack the verdict. I disagree, however, with the majority's conclusion that there is no evidence of prejudice requiring reversal.

Once objective facts are proven as to what transpired, relief is available if two elements appear. First, the acts or statements complained of must exceed tolerable bounds of jury deliberation, that is, they must constitute misconduct. Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978). It is clear that the juror's failure to reveal her knowledge of the prior shooting incident during voire dire is juror misconduct. The issue is whether this misconduct requires reversal. This is the second element necessary for the grant of a new trial and the test is correctly cited by the majority. This element is determined from the record independent of what jurors might later say. State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973).

The trial court determined that the alleged juror misconduct did not justify a new trial. A trial court has broad discretion in determining whether alleged juror misconduct justifies a new trial. State v. Chadwick, 328 N.W.2d 913, 918 (Iowa 1983). Abuse of this discretion will be found only if it is shown that the discretion was exercised for reasons clearly untenable. Id. I believe, however, the trial court abused its discretion in this case.

The supporting affidavits show that at least one juror failed to disclose her knowledge during voire dire of the prior shooting. It appears from the majority opinion and the State's brief that other jurors also failed to disclose that knowledge. The evidence of prejudice is clear. The defendant sought in his motion in limine to exclude evidence of the prior shooting because of the prejudicial nature of the prior incident to this case. The trial court granted the

motion in limine prior to trial. The State, in offering no resistance to the motion, recognized the prejudicial nature of the evidence. "We apply an objective rather than a subjective test in evaluating the asserted misconduct, determining whether a reasonable probability exists that it influenced the verdict." State v. Christianson, 337 N.W.2d 502, 506 (Iowa 1983). I believe the defendant has shown that a reasonable probability exists that the statements made by the juror during deliberation as to her knowledge of a prior shooting incident involving defendant influenced the verdict.

Moreover, the facts in State v. Jackson, 195 N.W.2d 687 (Iowa 1972), are distinguishable. There the defendant admitted during cross-examination that he had been previously convicted of a felony. When the jury in Jackson was informed by another juror of the nature of the felony, it immediately communicated a request to the judge for more information. The court was able to effectively admonish the jury not to consider that conviction. There was no opportunity in this case for the court to give a cautionary instruction. I would hold that the trial court abused its discretion in not granting a new trial on the basis of juror misconduct. Although I agree with the majority's decision in all other respects, I would reverse and remand on the issue of juror misconduct.