FILED
DEC 28 1977
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

LARRY GENE FROST,

Appellant.

Filed December 28, 1977

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Appeal from Marshall District Court - George G. Fagg, Judge.

Defendant appeals from judgment and sentence entered upon his conviction for robbery with aggravation claiming prejudicial juror misconduct. Affirmed.

Richard C. Turner, Attorney General, and Sandra Holien, Marshall County Attorney, for appellee.

John Werner, of Mickelson, Roan & Werner, of Toledo, for appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Larry Gene Frost, appeals from judgment of conviction for robbery with aggravation, contrary to § 711.2, The Code, and the resulting sentence. He argues that the trial court erred in overruling his motion for new trial. The motion alleged prejudicial juror misconduct. We affirm the trial court.

The alleged juror misconduct involved the act of one of the jurors in producing a light meter and identifying it as such to the other jurors during deliberations. Defendant contends that this was prejudicial because the subject of illumination was involved in the trial as part of the evidence identifying defendant as the perpetrator of the crime. The factual basis for the motion for new trial was presented to the trial court by stipulation. Included in such stipulation was the fact that the light meter was produced and identified to the jurors at such time as they were discussing the level of illumination at the scene of the crime. But it was further stipulated that no experimentation was conducted and there was no discussion by the jury of the light meter during its deliberations.

To justify a new trial based upon jury misconduct it must appear that the claimed misconduct was calculated to, and probably did influence the verdict. State v. Fedderson, 230 N.W.2d 510, 514 (Iowa 1975); State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973). The trial court has broad discretion in ruling on such matters and will not be reversed unless abuse of discretion and resulting prejudice to the movant are shown. State v. Houston, 209 N.W.2d 42, 44-5 (Iowa 1973); Townsend v. Mid-America Pipeline Company, 168 N.W.2d 30, 36 (Iowa 1969); State v. Little, 164 N.W.2d 81, 83 (Iowa 1969).

Appellant has not met his burden of showing probable influence and prejudice. The jury deliberated for more than five hours. No discussion was had regarding the meter and no experimentation was done with it. This case is factually similar to and requires the same outcome as State v. Little, 164 N.W.2d 81 (Iowa 1969). In **Little,** as in this case, the physical possibility of identification at the scene was an important issue. Three jurors, during a recess, visited the scene in violation of § 780.15, The Code 1966. They returned and discussed their findings during deliberations. The defendant was convicted. Armed with affidavits of other jurors, the defendant sought a new trial. Defendant's motion was denied and the trial court was affirmed on appeal. The supreme court reasoned that defendant had not shown that something occurred during deliberations, concerning the visit by the jurors to the scene, which was prejudicial to the defendant. **Little,** supra at 83.

We do not believe that a different result is required because the jury's verdict on the charge in question was returned subsequent to defendant's acquittal by the same jury on a different charge involving the same identification issue. The elements of the two charges were sufficiently different that no inference may fairly be drawn that the verdicts were inconsistent.

Lastly, we consider defendant's claim that the trial court applied an improper standard in evaluating the evidence of juror misconduct. This contention is based upon the fact that the trial court, in its ruling on the motion, stated:

> Upon submission of the motion, defendant's counsel spent much of his time dwelling upon contradictory evidence and demonstrating why the jury should have adopted it. Under well-established principles, it is too late for such argument.

Defendant urges that this comment indicates that the trial court, in weighing the probable effect of the juror misconduct, failed to consider the fact that the evidence of illumination was conflicting. A reading of the court's ruling in its entirety dispels this conclusion. We are satisfied that the arguments of defendant relating to the claimed juror misconduct were addressed by the court within the context of the entire record. In any event, we have considered the claim in light of the entire record and conclude that the trial court properly denied the motion for new trial.

AFFIRMED.