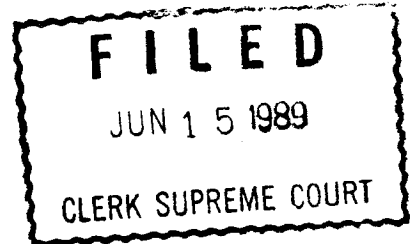


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
LEWIS EUGENE ANDERSON, III,)
Defendant-Appellant.)

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9-105
88-547

Appeal from the Iowa District Court for Washington County (CR 2069), Phillip R. Collett and Robert Bates, Judges.

Defendant appeals his conviction, following a jury trial, of first-degree murder and first-degree burglary.
REVERSED AND REMANDED.

Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Christie J. Scase, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

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The defendant appeals from his conviction, following a jury trial, of first-degree murder and first-degree burglary. We reverse.

A jury found Gene Anderson guilty of first-degree murder and first-degree burglary after hearing testimony implicating him in the fatal beating and stabbing of a 73-year-old widow from whose home a small safe was stolen.

On appeal, Anderson contends the trial court erred by refusing to suppress statements he made to Iowa Department of Criminal Investigation agents during interrogations conducted while his attorney was trying to contact him. He asserts the statements were obtained without a voluntary waiver of his Miranda rights and in violation of his sixth amendment right to counsel.

Anderson further contends the trial court also erred by: overruling his objections to the admissibility of several items of evidence after a pretrial hearing on his motions in limine; by denying his request for a change of venue premised on prejudicial local publicity; by overruling his motion for a mistrial after the prosecutor made an improper remark that the trial court subsequently ordered stricken from the record and admonished the jury to ignore; by overruling his objections to the terminology of several allegedly confusing jury instructions; and by denying his motion for a new trial based on an improper

comment made by a deputy sheriff to a juror at a basketball game during a weekend recess of deliberations.

Our scope of review is for errors at law. Iowa R. App. P. 4.

I.

We first address defendant's claim the trial court erred in overruling defendant's motion for mistrial based upon prosecutorial misconduct.

The instance of alleged misconduct occurred during the State's cross-examination of the defendant. The prosecutor asked the defendant about his .45-caliber Llama and the spring found at the crime scene. The prosecutor asked for the gun (State's exhibit 17) be cleared of cartridges. He then handed the weapon to the defendant in a manner which left the gun barrel pointing toward the prosecutor. The prosecutor then proclaimed "don't point it at me," while recoiling. Defendant's counsel objected. The court at this time ordered the parties into chambers where defendant's counsel made his motion for a mistrial. During the meeting in the chambers the prosecutor stated he was simply afraid of guns, however, he conceded his conduct was inappropriate and offered to apologize to the jury. During the conference the trial judge admonished the prosecutor, stating:

You have a lot of problems if you declare a mistrial in this case, and you know what they are. I am hesitant to do it now. Don't push me into that step.

The trial court then overruled defendant's motion for a mistrial, stating he would admonish the jury to disregard the prosecutor's remark and warning that no further unprofessional conduct by either party would be tolerated.

Upon reentering the courtroom the judge issued the following admonition to the jury:

Ladies and gentlemen of the jury, I now admonish you to disregard the prosecution attorney's remark in connection with the pointing of the gun and the handling of the gun. It is gone out, it has been stricken from this record, and you will remove it and completely and entirely disregard it in this record. Thank you.

The law regarding prosecutorial misconduct is well settled in Iowa:

Prosecutorial misconduct entitles the defendant to a new trial only when it appears to have been so prejudicial as to deprive defendant of a fair trial. . . . We will intervene only if the trial court abuses the broad discretion which it has to determine whether prejudice results. . . . On appeal, the defendant must be able to point to some unfairness which resulted in prejudice. (Citations omitted.)

State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983).

An improper comment will, in most instances, not be held to constitute prejudice where the court admonishes the jury to disregard it. State v. Williams, 315 N.W.2d 45, 56 (Iowa 1982). Only in rare cases where the prejudicial effect of the comment cannot be wiped away will an admonition be found insufficient. Id. With these principles in mind, we examine the defendant's claim.

Clearly, the prosecutor's actions here demonstrate misconduct. The onerous actions of the prosecutor in this case cannot be justified. The Iowa Code of Professional Responsibility (Cannon 7, DR7-106(c)(6)) provides:

(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * *

(6) Engage in undignified or discourteous conduct which is degrading to the tribunal.

The prosecutor attempted to excuse himself by asserting he was "afraid of guns," a claim which was clearly untenable. Before handing the gun to Anderson the gun was inspected a final time to be sure that it was not loaded. In addition, Anderson was holding the gun in the exact manner which the prosecutor had handed it to him. The sophomoric ploy by the prosecutor was designed, at the very least, to transmit the prosecutor's concocted fear of the defendant to the jury or, at its worst, to attempt to put the jury into the victim's shoes, by reenacting the fears she may have felt when the defendant allegedly entered her home with a gun. In either case, the prosecutor's actions were disgraceful, and should not and will not be tolerated in the courts of this State.

The supreme court in State v. Vickroy, 205 N.W.2d 748, 749 (Iowa 1973), adopted the following language which we find applicable here:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of the sovereignty whose obligation to govern

impartially is as compelling as its obligation to govern at all; and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the two-fold aim of which is the guilt shall not escape or innocence suffer. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 749. Here, we hold the state's attorney has overstepped his mandate.

II.

Next, the defendant argues the district court erred when it denied his motion for a new trial based upon juror misconduct. Sometime after the jury verdict had been rendered in this matter, the county attorney was apprised one of the jurors had had contact with a deputy sheriff during a weekend recess after deliberations had commenced. The county attorney contacted defense counsel and the juror was deposed. The deposition revealed the contact occurred while the juror was attending a Washington High School basketball game. The jury gave the following description of the event:

My wife and my youngest daughter and myself were entering the building and walking through the door toward the ticket counter when Bill Guenther, a reserve special deputy, I believe they're called, kind of waived at me and I kind of waived back and kind of off-handedly he said, "What's this not guilty shit." As I remember, those were his exact words. At which time, I don't remember exactly what I said, but the gist of it would be, what do you mean, what's this not guilty shit? I didn't understand, and then he said something to me along the lines of not wanting to be in my position type of comment, at

which time I just kind of--you know, I was kind of mad at him so I just kind of ended the conversation, bought my ticket, and walked in and that was pretty much the extent of it. It was a brief, probably ten-second, fifteen-second, conversations, very brief.

The juror indicated he was aware of the judge's admonition that jurors were not to talk to anyone about the trial, he also stated the deputy's comments did not effect his decision and that he did not relay the episode to fellow jurors until after they had entered the verdict.

The trial court decided not to award Anderson a new trial because he had failed to show reasonable probability that the outcome of the proceeding was effected by the incident.

The State argues our review should be guided by the three-pronged test used by the supreme court in State v. Cullen, 357 N.W.2d 24 (Iowa 1984). The defendant, on the other hand, argues the rule set out in State v. Carey, 165 N.W.2d 27 (Iowa 1969), applies to the facts here.

The Cullen court distinguished its holding from its prior decision in Carey:

As precedent under the facts of this case, Carey is inopposite. In Carey we were concerned with manipulation of the jury by outsiders; here we are concerned only with the internal operation of the jury. We believe the former case justifies a stricter rule, designed to keep the jury above suspicion. (Emphasis added.)

State v. Carey, 357 N.W.2d at 28. Therefore, the tests articulated in Cullen are not applicable to the case at bar.

In Carey, defendant's attorney moved for a mistrial after he discovered a sign in the jury room stating coffee "will be furnished in the jury room by the county clerk and county attorney." Id. The district court overruled this motion finding that it was improbable prejudice had resulted. However, the supreme court reversed, holding that while it was not likely the jurors could be corrupted for the price of a cup of coffee, "the jury is to be above suspicion and . . . any practice which brings its proceedings under suspicion is to be prohibited." Id. at 29. The court went on to state:

To sanction the transaction in question would bring disgrace upon the administration of the law. There is absolute safety in the rule we adopt; there is danger in a different one. . . . In order that the institution of jury trials be preserved and its usefulness continued, its deliberations and pronouncements must be kept pure and untainted, not only from all improper influences, but from the appearance thereof. It is often said that the jury trial will remain so only as long as the public confidence in the institution prevails Conduct which is proved would give rise to doubt and disrespect, or the mere appearance of such conduct will not meet with the approval of public opinion must be severely condemned.

Id. at 29-30.

The facts now before us are more egregious than those addressed in Carey, a uniformed sheriff--a state law enforcement officer--approaches a juror during a recess from deliberations and makes a statement which indicates his disfavor in the possibility of an acquittal of the defendant. Further, this conversation occurs in a crowded

public place, where any passersby may hear the remarks or witness a conversation taking place between a juror in a murder trial and a representative of the sheriff's department before the trial has been decided. The actions of the deputy sheriff here cast a taint over these proceedings. Clearly, at least the appearance of improper influence here is the same as if the juror had been talking to the county attorney. The juror stated during his deposition the incident did not influence him. However, the juror refused to give his name during the deposition and he stated that he was stunned and upset by the deputy's conduct.

Clearly the conduct complained of here falls into the category of actions which the supreme court found to be distasteful in Carey. We determine misconduct toward a juror exists in this case.

III.

Regardless of our determinations above, the State urges the evidence of Anderson's guilt in this case was overwhelming and therefore, defendant here was not prejudiced by the errors outlined above. We disagree.

Juror or prosecutor misconduct will not be grounds for new trial unless prejudice is shown. State v. Carey, 165 N.W.2d at 28-29; State v. Williams, 315 N.W.2d at 55.

Even if we agreed with the State that neither error standing alone is enough to warrant a new trial, we

determine the cumulative effect of the incidents described above denied Anderson of a fair trial. Consequently, we are obliged to grant the defendant a new trial. Carey, 167 N.W.2d at 36.

REVERSED AND REMANDED.

All judges concur except Habhab, J. and Donielson, J., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the convictions and sentences.

As it relates to prosecutorial misconduct, its prejudicial effect must be examined in the context of the entire trial, considering, among other factors, the severity of the misconduct, the length of the trial, and the strength of the evidence supporting the jury verdict.

This trial lasted in excess of two weeks. The comment at issue is the only incident of misconduct alleged during the entire trial. It was clearly an isolated incident. Ordinarily, a finding of prejudice results from persistent efforts to inject prejudicial matter before the jury. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976).

When the prosecutor handed the defendant the gun, the barrel was aimed toward the prosecutor. The prosecutor, knowing that there were not any cartridges in the gun, told the defendant, "don't point it at me." There were two other incidents during the course of the trial when defense counsel jokingly made comments to State's witnesses regarding their handling of this particular gun. While Deputy Sheriff Seaward was demonstrating how to check to see if the chamber of the gun was cleared, defense counsel stated, "that's it, pointing it at the ceiling." The following morning, when DCI Agent Harvey was explaining his examination and test firing of the gun, defense counsel

commented, "especially don't point it toward me." Each comment was met with chuckles from the gallery.

The defendant moved for a mistrial immediately after the incident complained of. The trial court denied the defendant's mistrial motion and warned that no further unprofessional conduct from either party would be tolerated. Upon re-entry into the courtroom, the court admonished the jury as follows:

Ladies and gentlemen of the jury, I now admonish you to disregard the prosecution attorney's remark in connection with the pointing of the gun and the handling of the gun. It is gone out, it's been stricken from this record, and you will remove it and completely and entirely disregard it in this record. Thank you.

I find that the admonition by the court is adequate to cure whatever prejudice the defendant might otherwise have suffered from the comment. The trial court in this case concluded that the county attorney's comment was not so prejudicial as to require mistrial. I am unable to find that the trial court's determination constituted an abuse of discretion.

I am also of the opinion that the trial court did not abuse its discretion when it overruled the defendant's motion for mistrial on the grounds of juror misconduct. I concur with the majority that the remark was totally and completely improper.

The remark by Mr. Guenther, a "reserve special deputy," was made to a juror during the weekend recess. Mr.

Guenther's main occupation is that of a "gas delivery man," and he was not a witness during the trial. The juror did not relate any information about this remark to the other jurors until after they had signed the final verdict form on Monday. The juror testified he had made up his mind as to his vote before the remark was made. The juror pointedly said that the remark had "absolutely nothing to do with the verdict that was handed down by this jury" Although the remark of Mr. Guenther was inappropriate, I am unable to classify it as juror misconduct. Even though the remark was improper, I do not believe, under the totality of the circumstances, that it is cause for a new trial.

The trial court rejected the defense motion for a new trial on the grounds that the defense failed to show reasonable probability that the outcome of the proceeding was affected by the incident. This finding is consistent with the juror's deposition when read in its entirety. I am unable to find that the trial court abused its discretion by denying defendant's motion for a new trial on this ground.

I would affirm.

Donielson, J. joins this dissent.