IN THE COURT OF APPEALS OF IOWA

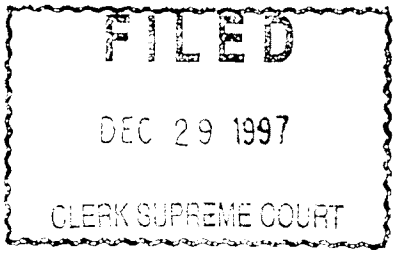
No. 7-532 / 96-1193

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STATE OF IOWA,
Appellee,

vs.

BRETT MARION BREKKE,
Appellant.



Appeal from the Iowa District Court for Marshall County, Sandra J. Holien, District Associate Judge.

The defendant, Brett Brekke, appeals his conviction for stalking in violation of Iowa Code section 708.11 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, James DeTaeye, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

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

VOGEL, J.

The defendant, Brett Brekke, appeals his conviction for stalking in violation of Iowa Code section 708.11 (1995). Among the arguments raised on appeal, we specifically address Brekke's arguments that the district court erred in: 1) not granting a new trial based on juror misconduct; and 2) denying his motion to dismiss based on his counsel's failure to obtain his consent to a waiver of his right to a speedy trial.

Background facts. Brekke had been dating the victim, Weitzell, in September 1992, and they lived together for approximately one month starting in December of 1994. The relationship was not physically abusive, but the couple frequently argued. The relationship ended and the couple tried to reconcile on a few times. Brekke started to threaten to kill Weitzell's horse, as well as her family, and often sought her out at her work place or at her home. On March 27, 1995, Weitzell obtained a temporary protective order against Brekke. On February 16, 1996, the jury found Brekke guilty of stalking in violation of Iowa Code section 708.11 (1995). Brekke appeals.

I. Juror misconduct. Brekke argues the district court erred in not granting him a new trial based on alleged juror misconduct. He contends that during a recess at least two jurors drove on a road in order to verify his credibility as to whether he took the road because it was the shortest route or if he had used it for the purpose of stalking his former girlfriend.

The district court has broad discretion in ruling on jury misconduct issues. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). We will only find an abuse of discretion if the district court's ruling is "clearly unreasonable under the attendant circumstances." *Id.* We will not impeach a verdict based on jury misconduct unless the following three-part test has been met: (1) the evidence from the jurors must consist only of 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. *Id.* at 27; *State v. Wells*, 437 N.W.2d 575, 580 (Iowa 1989).

Brekke, in support of his motion for a new trial, presented the following affidavit of Ms. Mathis, the trial clerk:

> [A]fter the Court had instructed the jury in the above-referenced matter, and the jury had adjourned its deliberations, during the course of its deliberations, I heard one of the male jurors state that he had gone out over the weekend, driven on Sand Road and Oaks Avenue, and that, in his opinion, it was shorter to drive from Albion to Marshalltown on Oaks Avenue than on Sand Road; and that one of the other male jurors responded that he had driven it, too.

Brekke also submitted the affidavit of Mr. Smith, the jury foreman, who stated:

> [D]uring the course of our deliberations, I recall one male member of the jury panel raising the question as to whether or not anybody had driven out there (referring to that area of Sand Road where Dawn Weitzell had testified that she lived, and Oaks Avenue between Albion

> and Sand Road); that, when he raised the question, I stopped him and told him no one was supposed to do that, to which he replied, "Well, I did"; and that I believe he had gone out there sometime during the recess on Friday afternoon, February 16, and when we appeared again in court on Monday, February 19, 1996.
>
> I further depose and state that I don't recall him giving any details about the length of either route or the distances involved, and that his comments about his view of the scene, or any conclusions he was trying to draw from any test drive he had made past the scene, did not affect my decision as to whether or not to find the defendant guilty of the offense charged, that I found the defendant guilty of the offense charged based upon other evidence which I found credible . . . .

The juror's affidavit was properly offered to show any extraneous information brought to the attention of the jury. *See* Iowa R. Evid. 606 (b); *State v. Johnson*, 445 N.W.2d 337, 341 (Iowa 1989). However, under Rule 606(b) any testimony concerning the *impact* these statements had upon the jury's deliberations must be disregarded. *Id.* We note the district court appeared to disregard in its ruling any evidence relating to the influence of the statements on the jury. The trial court asserted the last prong of the test fails as Brekke did not meet his burden of demonstrating the juror misconduct complained of was "calculated to" or "with reasonable probability did, influence the verdict." We agree.

Brekke cites *State v. Henning*, 545 N.W.2d 322 (Iowa 1996) in support of his argument for a new trial. In *Henning*, juror affidavits indicating some jurors had viewed a television broadcast about defendant was reversible error, even though the jurors stated it had not affected their verdict. In determining whether the misconduct

was calculated to, and with reasonable probability did, influence the verdict, we look to the standard applied in *Henning*, which "has been expressed in terms of whether the material was of a type more likely than not to implant prejudice of an indelible nature upon the mind." *Id.* at 325 (citing *State v. Mayberry*, 411 N.W.2d 677, 685 (Iowa 1987)).

In *Ten Hagen v. DeNooy*, 563 N.W.2d 4, 10 (Iowa App. 1997), the plaintiff, in an effort to establish juror misconduct, submitted affidavits from jurors indicating two jurors conducted independent experiments to ascertain the effect of applying brakes to a motor vehicle at certain speeds on a gravel road. *Id.* The jurors evidently shared the results of their experiments with other members of the jury. *Id.* One member measure farm equipment at her home. *Id.* We held the plaintiff in that case was not entitled to a new trial because there was no showing of prejudice. *Id.*

In this case, the State minimizes the jurors actions and argues the affidavits show, at most, one juror had driven on Sand Road and Oaks Avenue over the weekend. It cites *State v. Houston*, 209 N.W.2d 42 (Iowa 1973) to illustrate that general knowledge shared among jurors—based on their common experiences and observations—are essential functions of jury deliberations and does not amount to misconduct.

While we find it was improper for the jurors in this case to experiment by measuring the length of the drive, and apprise other members of their findings, we

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cannot find any prejudice resulted to Brekke. It did not with reasonable probability influence the verdict. The record is replete with other incriminating evidence from which the jury could have reached the same verdict. Moreover, the tests conducted by the jurors "involved matters within the realm of common experience," and thus a new trial is not warranted. *Ten Hagen*, 563 N.W.2d at 10; *accord State v. Sauls*, 391 N.W.2d 239, 242 (Iowa 1986); *State v. Houston*, 209 N.W.2d 42, 45 (Iowa 1973) (stating "[a] juror is not forbidden to consider and pass upon the evidence in light of common experience and common observation"; no new trial warranted).

We accordingly conclude the nature of the information to which the jury was exposed in this case was not sufficiently prejudicial to impede Brekke's right to a fair trial. We find Brekke's motion for a new trial was appropriately denied by the trial court.

II. Speedy trial. Brekke argues he was denied his right to a speedy trial under Iowa Rule of Criminal Procedure 27(2)(b) when his counsel continued the trial date without obtaining his consent to a waiver.

We review speedy trial issues under Iowa Rule of Criminal Procedure 27(2) for correction of errors at law. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991). The trial court's factual findings are binding on appeal if supported by substantial evidence. *State v. Bond*, 340 N.W.2d 276, 270 (Iowa 1983).

A trial must be commenced within the ninety-day speedy trial period required by Rule 27(b)(2) or the court must dismiss the case unless (1) the defendant waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) good cause exists for the delay. *Finn*, 469 N.W.2d at 694. In determining whether good cause exists, factors such as the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and any prejudice resulting from the delay are all permissible considerations. *State v. Todd*, 468 N.W.2d 462, 469 (Iowa 1991).

The trial information was filed on May 1, 1995. Brekke argues the speedy trial period expired on July 31, 1995, ninety days after the trial information was filed. He asserts his statutory right was violated when, upon a defense motion, the court continued the trial until August 15, 1995. We find the trial court appropriately determined the fifteen-day delay was for good cause or attributable to Brekke. After one continuance was granted to the defense for purposes of taking depositions, defense counsel asked for another continuance as he learned on July 25 that he had a conflict with the July 27 trial date. The case of *State v. LeFlore*, 308 N.W.2d 39, 40-41 (Iowa 1981) is factually similar to this case. In *LeFlore*, defendant's attorney waived the defendant's right to a speedy trial and moved for several continuances; defendant refused to sign a waiver form his attorney provided him. *Id.* The court in

that case rejected defendant's claim that his statutory right to a speedy trial was violated. It stated:

> [T]he statutory right to a speedy trial under rule 27(2)(b) is not a personal right that can be waived only by the defendant. Defense counsel acting within the scope of his or her authority may waive this right on the defendant's behalf without the defendant's express consent. . . . Defense counsel's action was within the scope of his authority, and the delay caused thereby was in no way attributable to the State.

Id. at 41.

Substantial evidence supports the trial court's finding that the fifteen-day delay was for good cause or attributable to the defendant. We further find no prejudice to Brekke as he was released on bail while awaiting trial. We therefore find the trial court did not abuse its discretion in overruling Brekke's motion to dismiss.

We affirm the trial court's ruling on Brekke's motion to dismiss, as well as the trial court's denial of a new trial. Having considered all other arguments, we affirm.

AFFIRMED.