IN THE COURT OF APPEALS OF IOWA

No. 6-418 / 05-0834
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY EDWARD HARRIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

The defendant appeals from the judgment and sentence entered on his conviction on delivery of marijuana and failure to affix a tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Melissa R. O'Rourke, County Attorney, and Coleman McAllister, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

The defendant-appellant, Johnny Harris, appeals from the judgment and sentence entered, following a jury trial, to two counts of delivery of marijuana and one count of failure to affix a drug tax stamp. He contends the trial court abused its discretion in denying his motion for new trial based on jury misconduct. We affirm.

I. Background facts and proceedings.

The defendant and co-defendant, Melissa DeBruin, were tried jointly in March of 2005. During jury deliberations, the jury sent the judge four notes. The third, sent after nine hours of deliberation, read:

> Judge Scott—We have been deliberating for a majority of the time in which eleven jurors feel strongly that the [defendants] are guilty on all accounts. One juror has been stuck on the entrapment question. As a group of eleven, who feel very unified of the verdict, also feel very strongly that Judson Kruse is not able to be reasonable in this decision. We are not willing to be hung or vote non-guilty based on this one unreasonable juror.

The eleven jurors in agreement each signed at the bottom of the note.

The court met with the defendants and counsel to discuss how to proceed. The defendants moved for a mistrial. The State resisted, arguing the jury should be sent home for a long weekend, reconvened on Monday morning, and given one last chance to reach a verdict. The court decided to address the jury and then consider the motion and resistance after addressing the jury. Before the jury could be summoned, however, the judge received a fourth note that indicated the jury would have a verdict in five minutes.

The jury found both defendants guilty on all counts charged. At the defendants' request the court polled the jury and each juror stated "I agree with the verdict."

In April defendant filed a motion for new trial alleging in part "that the jury received evidence not authorized by law" and reached its decision "by a means other than fair expression of opinion of all the jurors." The motion was accompanied by an affidavit from juror Judson Kruse. It stated, in relevant part:

> While the jury was conducting deliberations, another juror . . . made a statement to me in front of the entire jury stating, "Judson, she's been convicted on drug charges before." This statement was made loud enough and plain enough for all members of the jury to hear.
>
> It was clear to me that the other juror was referring to Melissa DeBruin.

At the hearing on the defendants' motions for new trial, the court allowed counsel to question the jurors about any improper statements or discussion of prior convictions. Only three jurors remembered any discussion of DeBruin's prior history. Juror Tennapel did not recall making any comments during deliberations. Juror Fopma identified Tennapel as the one who, on the second day of deliberations, commented that DeBruin had a previous conviction. The comment was made early in the afternoon and involved a brief exchange when other jurors cut Tennapel short and "instantly said" "No, you can't take that into consideration. We can't do that." Juror Anderson from Hawarden also heard Tennapel's comment and agreed that the jurors immediately rejected the comment as irrelevant. Juror Raman was the third juror who heard the comment and described the entire exchange as having lasted no more than "15, 20

seconds." According to Raman, the jurors refused to consider the comment and had already arrived at a verdict when it was made.

In stark contrast to the testimony of these three jurors, juror Kruse testified that the exchange lasted "[f]ive to ten minutes, then others piped in as well." Contrary to the testimony of the other eleven jurors, juror Kruse testified that "almost everyone [else] heard it, had to have heard it because it was shouted in a loud and emotional voice." Kruse was uncertain when the comment occurred on the second day of deliberations, other than to say it was "very close to the end."

In its written ruling, the court denied the motions for new trial, specifically finding the testimony of juror Kruse was not credible and that he was emotionally distraught because of his remorse over the verdict. The court found there was not a "reasonable probability that the misconduct influenced the verdict."

> First, the conversation was brief, lasting 45 seconds or less. Second, it was heard by only three of the twelve jurors. Third, all three jurors who heard the statement knew that it was not evidence and admonished one another to not consider it. Fourth, the jury deliberated for many hours and, from the content of their questions, thoroughly considered both the evidence and the instructions. Finally, since the juror who made the statement does not remember it, it is difficult to find the misconduct was calculated to influence the verdict. The misconduct has more of the appearance of a casual observation than an intentional effort to improperly influence the verdict.

The court also specifically found that "there is no evidence before the Court that the misconduct concerning the record of Ms. DeBruin had any effect on the deliberations concerning Mr. Harris."

II. Scope and standard of review.

We review a trial court's ruling on a motion for new trial for correction of errors at law. Iowa R. App. P. 6.4. The court's broad discretion will not be

disturbed unless it was clearly unreasonable under the attendant circumstances. *State v. Wells*, 437 N.W.2d 575, 581 (Iowa 1989). Our supreme court has "been loath to grant a new trial on the ground that jurors have learned from sources outside the trial that the accused has been guilty of criminal acts other than the present charge." *State v. Henning*, 545 N.W.2d 322, 324 (Iowa 1996).

III. Discussion.

A three-part test is used to determine whether juror misconduct necessitates impeaching a verdict:

> First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation. Third, and finally, it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Smith, 573 N.W.2d 14, 18 (Iowa 1997) (quoting *State v. Wells*, 437 N.W.2d 575, 580 (Iowa 1989)).

> The impact of the misconduct is judged objectively to determine whether the extraneous information would prejudice a typical juror. The standard 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.

Henning, 545 N.W.2d at 324 (citations omitted). A trial court "properly could examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented before making a commonsense evaluation of the alleged impact of the jury misconduct." *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983).

The defendant contends the comment concerning his co-defendant's prior criminal history was calculated to and did influence the jury's verdict. He argues the timing of the comment is important because the deliberations had lasted

many hours and the eleven jurors "just needed to convince the 'unreasonable' juror to avoid a mistrial."

The trial court considered the timing of the comment in determining there was not a reasonable probability the misconduct influenced the verdict. It gave greater weight to the testimony of the other jurors than that of juror Kruse based on its assessment of the jurors' credibility. It also considered the entire record of the trial and that the comment related to the co-defendant.

The juror who made the comment did not even remember making it. The three jurors who heard it immediately said it was not evidence and could not be considered. Juror Kruse's "unreasonable[ness]" specifically related to the charge of entrapment concerning Ms. DeBruin. The evidence against defendant Harris was strong. We conclude the trial court correctly determined the misconduct was not calculated to influence the verdict and there was no reasonable probability it did. We find no abuse of discretion in denying the defendant's motion for new trial on this ground.

AFFIRMED.