

**IN THE COURT OF APPEALS OF IOWA**

No. 8-550 / 06-1495  
Filed December 17, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JARMAINE LEVAR ALLEN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Michael D. Huppert,  
Judge.

Jarmaine Allen appeals his judgment and sentence for first-degree  
murder, claiming multiple errors. **REVERSED AND REMANDED.**

Frank Burnette, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Daniel Voogt and Robert  
DiBlassi, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

**VAITHESWARAN, J.**

Jarmaine Allen appeals his judgment and sentence for first degree murder, claiming multiple errors. We reverse and remand for a new trial.

***I. Background Proceedings***

This is the latest appeal involving Allen's alleged involvement in the 1995 killing of Jody Stokes. Allen's first trial resulted in a hung jury. Allen's second trial resulted in a judgment and sentence for first-degree murder. This court affirmed the judgment and sentence. See *State v. Allen*, No. 98-2012 (Iowa Ct. App. Jun. 14, 2000). Allen subsequently filed an application for postconviction relief raising a due process claim and several ineffective-assistance-of-counsel claims. This court found merit to one of the claims and reversed and remanded for a new trial. *Allen v. State*, No. 03-1288 (Iowa Ct. App. Apr. 28, 2005).

Following his most recent arraignment, Allen filed a notice of intent to take depositions of individuals who had already testified in his previous trials. The court found that these depositions would be unnecessary, duplicative, and unduly expensive. Allen made further specific requests to depose certain witnesses; these requests were also denied.

Allen next asked the court to compel the State to produce exculpatory evidence. The district court ruled that the State had no duty to produce anything that it had already produced.

Allen also filed a motion to exclude the prior testimony of witness Shyrome Avant. The district court allowed the testimony based on Avant's unavailability.

Allen notified the court of his intent to call witnesses Christine Hogate and Clifford Freeman, who were slated to testify about others' involvement in the Stokes murder. The district court excluded their testimony.

The jurors began deliberations on May 23, 2006, and found Allen guilty of first-degree murder three days later. Allen filed a motion for new trial, claiming that the court attendant did not properly supervise the jurors and that the jurors were exposed to extraneous information related to the case. Allen also asked the district court judge to recuse himself from ruling on the motion for new trial because he was listed as a witness and because of his professional relationship with the court attendant. The court denied the motion for recusal. The court also denied Allen's motion for new trial.

Allen was sentenced to life in prison. This appeal followed.

Allen raises several issues on appeal. He contends: (1) his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated when he was not permitted to depose the State's witnesses prior to this trial, (2) the district court erred in overruling his request for exculpatory evidence, (3) the district court erred in excluding the testimony of Christine Hogate and Clifford Freeman, (4) the district court erred in allowing the prior testimony of Shyrome Avant to be read into the record, (5) the district court erred in failing to find prosecutorial misconduct, (6) the district court judge erred in failing to recuse himself from ruling on the motion for new trial, and (7) the district court abused its discretion in denying Allen's motion for new trial based upon a claim of jury misconduct. We find the final issue dispositive.

## ***II. Jury Misconduct***

A new trial is authorized “[w]hen the jury has received any evidence, paper or document out of court not authorized by the court.” Iowa R. Crim. P. 2.24(2)(b)(2). Iowa Rule of Evidence 5.606(b) sets forth the parameters of the court’s inquiry, stating in pertinent part that “a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.”

Allen contends that jurors were exposed to several types of extraneous information during deliberations. We find it necessary to address only one: what the jurors heard from another juror during deliberations.

Two jurors testified that one of their peers told them Allen was incarcerated for another offense at the time of this trial. One juror said, “Somebody mentioned that [Allen] had already been convicted of one crime so not to worry about convicting him of this one since he was already doing jail time.” Another stated he heard a juror say that Allen “was incarcerated currently for something else.”

In considering these statements, the district court found “the fact that the defendant had previously been incarcerated was already made part of the record.” Based on this finding, the court declined to order a new trial.

District courts have broad discretion in ruling on these matters. *State v. Wells*, 437 N.W.2d 575, 581 (Iowa 1989). In the exercise of that discretion trial courts properly could “examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented.” *State v.*

*Johnson*, 445 N.W.2d 337, 342 (Iowa 1989) (quoting *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983)). Mindful of the district court's discretion, we have carefully considered the record to determine whether the jurors' statements concerning Allen's present incarceration warrants a new trial.

We begin with the question of whether the jurors' statements were simply a repetition of evidence that legitimately came into the record. On this question, we examine the testimony of two witnesses.

The first witness, Shyrome Avant, whose transcript from Allen's second trial was admitted over Allen's objection, testified that he and Allen "were locked up together at one time." The prosecutor then asked him, "And particularly were you locked up in the Oakdale facility here in Iowa between late January and early February of 1997?" Avant responded, "Yes, I was." Later, defense counsel asked Avant, "You said you were with Jarmaine maybe three weeks or so?" He answered, "Three to four weeks." This testimony only disclosed that Allen was incarcerated nine years before the present trial. Avant did not testify that Allen was presently incarcerated.

John Harris III was the second witness who testified about Allen's incarceration. Defense counsel asked Harris, "At one time were you in Oakdale with Shyrome Avant and Jarmaine Allen?" He answered, "Yes." He was then asked, "Can you tell me when that was?" He answered, "Approximately—I was there with Shyrome in December, and I think Jarmaine got there probably towards the end of December, a couple of weeks after I did, of 1996." Again, this testimony only disclosed that Allen was incarcerated ten years earlier. There was no indication that Allen was in prison at the time of this trial.

Notably, defense counsel filed a pre-trial motion to exclude evidence of Allen's prior arrests, convictions, or other bad acts. That motion was granted, "subject to the State's right to cross-examine the defendant on any of those issues, should he testify, or if the door is opened on rebuttal . . . ." The door was not opened. Based on this record, we conclude the jurors' disclosure that Allen was presently incarcerated was an out-of-court statement not authorized by the district court. Iowa R. Crim. P. 2.24(2)(b)(2).

Our inquiry does not end here because, under our State's case law, a party seeking to overturn a verdict must show "the misconduct was calculated to and, with reasonable probability did, influence the verdict." *State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996) (quoting *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991)).<sup>1</sup> The impact of the misconduct is judged objectively to determine whether a typical juror would have been prejudiced by the extraneous information. *Id.* The material must be "of a type more likely than not to implant prejudice of an indelible nature upon the mind." *Id.*

We conclude the extraneous information "was sufficiently prejudicial to deny defendant a fair trial." *Id.* The information was introduced into the jury room some time during deliberations. The comment that the jurors should not worry about convicting Allen because he was already serving time was, on its face, a statement designed to influence the verdict.

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<sup>1</sup> This is part of a three-part test adopted by our courts to analyze questions of jury misconduct. See *Wells*, 437 N.W.2d 580. The first part of that test was modified through an interpretation of what is now Iowa R. Crim. P. 2.24(2)(b)(2). *Id.* The second part of the test, whether the acts "exceed tolerable bounds of jury deliberation," was satisfied based on our conclusion that the jurors considered information that was not in the record and was expressly excluded from the record. See *Johnson*, 445 N.W.2d at 342 (stating "introduction of additional, outside information is beyond permissible bounds [of jury deliberation]").

We acknowledge there is no indication that any of the jurors knew exactly what conviction formed the basis of Allen's present imprisonment or the statutory prison term to which he was previously sentenced. However, there is a reasonable probability that a typical juror would have surmised from such a statement that his or her finding of guilt would have no effect on a defendant's liberty.

In reaching this conclusion, we have examined the remaining duly-admitted testimony. See *Johnson*, 445 N.W.2d at 342. In our last appellate opinion, we characterized this as "a very close case." *Allen v. State*, No. 03-1288 (Iowa Ct. App. Apr. 28, 2005). The record from the present trial leads us to make the same characterization, as the case was fraught with inconsistencies and equivocal testimony concerning the identity of the shooter.

The State's lead witness, Kelly Scott, testified on direct examination that he heard approximately six shots and saw someone running through his yard. When police showed him a photo array, he identified the running person as Jarmaine Allen. On cross-examination, however, he acknowledged previously testifying that he did not know who ran across the yard and denying that Allen was the person running across the yard. He also admitted that the person who ran across his yard had a hood over his head and was trying to cover his face as he was running.

A police officer testified that he showed Kelly Scott and others a photo array. He testified that no one other than Scott picked Allen as the shooter.

The prosecution also introduced the prior testimony of Shyrome Avant, who was unavailable at the time of this trial. He testified that he, John Harris III,

and Allen were at a correctional facility together when Allen confessed to the Stokes shooting. The defense at the prior trial, however, impeached Avant by pointing out that criminal charges were pending against him, those charges had yet to be resolved, and he could be looking at additional prison time. The defense also used Avant to diminish the value of another State witness, Marquetta Slater. Slater had been engaged to Stokes at the time of the shooting. Avant admitted that Slater was his girlfriend at the time of his testimony against Allen, that he had spoken to her, and that he knew the State was having trouble putting together a case against Allen.

Marquetta Slater, in turn, admitted she dated Avant. She implied there may have been bad blood between Allen and Stokes. She also testified that Allen, armed with a gun, told Stokes to come out of a community center one or two days before the shooting. However, she acknowledged she saw no confrontation between the two on that night. Slater also acknowledged she spoke to assistant county attorneys about information Avant might have on the Stokes shooting.

Returning to Avant's testimony concerning Allen's prison confession, the defense called the purported third participant in the conversation, John Harris III. Harris admitted that he was in prison with Avant and Allen, but stated that he was not present during a confession by Allen, as Avant claimed.

Another witness, Robert Hawthorne, also identified Allen as the shooter, but his testimony was severely impeached. He ran the bar outside of which Stokes was shot. He testified he saw "an arm and a silhouette" step out from behind the lounge and shoot Stokes. That arm and silhouette, he said, belonged



to the man in the courtroom, Jarmaine Allen. Hawthorne conceded he only saw the side profile of the shooter. He also conceded he entered a plea to federal crimes and had his sentence reduced by half in exchange for information concerning any crime he was aware of.

Other witnesses at the scene were of even less assistance in identifying Allen as the shooter.

Passerby Jerry Hall testified he pulled up to stoplights near the shooting and saw a man step out from behind a lounge and shoot another man who had just come out of the lounge. He stated, "I know the man shot the other man, I just don't know what he looked like."

Nicholas Jones recanted prior testimony identifying Allen as the shooter. He testified that he did not see who shot Stokes and that he did not see a gun. Although the State presented evidence of his prior inconsistent statements, the defense pointed out that those statements were acquired when Jones was a minor, his parents were not present during questioning, and he spoke to the prosecutors with Stokes's mother at his side.

William Holder testified he saw Stokes standing outside the lounge, heard shots, and saw Allen and another man walking toward the lounge. He admitted he did not testify truthfully on three prior occasions. He also admitted he thought his girlfriend had been having sex with Allen. Finally, he admitted he had bad eyesight.

Johnny Thibodeaux testified he heard five to seven shots but never saw the shooter. He testified the shots may have been fired by someone inside the car that was parked next to Stokes. No testimony placed Allen inside the car.

Randy McCauley testified he heard gunshots. He stated he was suspicious of the way the car next to Stokes pulled away.

Pecola Fugate testified she heard gunshots. She said she saw Chuck Holder running from something. She said she also saw another man running away from the vicinity of the shooting. She testified that person was not Allen.

There was also no physical evidence tying Allen to the crime. An officer found shell casings at the scene but an identification technician with the Des Moines Police Department testified he was never requested to fingerprint the casings. Another officer testified no gun was found at the scene. A criminalist with the Iowa Division of Criminal Investigation testified that at least four different firearms could have been used in the crime.

In sum, using the trial court standard which requires examination of “the claimed influence critically in light of all the trial evidence,” we conclude the evidence was not strong enough relative to the jury misconduct to warrant the denial of Allen’s new trial motion. See *Johnson*, 445 N.W.2d at 342. We conclude the portion of the new trial motion alleging jury misconduct should have been granted.

We find it unnecessary to address the remaining issues raised by Allen. We reverse and remand for a new trial.

**REVERSED AND REMANDED.**