IN THE COURT OF APPEALS OF IOWA

No. 2-1000 / 12-0055
Filed February 13, 2013

KAYDON M. TURNER,
Plaintiff-Appellant,

vs.

BOBBI ANN FRANSEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

The plaintiff appeals a district court ruling denying her motion for new trial following a jury verdict in favor of the defendant in a personal injury action. **AFFIRMED.**

Joseph C. Creen of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellant.

Heather L. Carlson and Patrick L. Woodward of McDonald, Woodward & Carlson, P.C., Davenport, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Following a jury verdict in favor of the defendant, Bobbi Ann Fransen, in a personal injury action arising out of a car accident, the plaintiff, Kaydon Turner, sought a new trial based in part on claimed juror misconduct. She asserted that one juror impermissibly informed the other jurors about her experience with the type of vehicle driven by Fransen, thereby influencing the jury's finding of no fault. The district court rejected this argument, as do we.

I. Background Facts and Proceedings.

Just before noon on April 16, 2007, Bobbi Fransen was driving her Jeep Cherokee home from class at a community college. She was traveling in the northbound lane on Highway 67. Kaydon Turner was behind her in a Dodge Neon. Turner said that as the Cherokee approached an intersection with a flashing yellow light, it signaled a right turn and moved into the right turn lane. Turner continued traveling straight ahead in her lane. All of a sudden, according to Turner, instead of turning right, the Cherokee turned left in front of her. Turner's much smaller vehicle went underneath Fransen's, flipping the higher profile Cherokee on its side.

Fransen's account of the accident was different. She said that as she approached the intersection, she slowed down and signaled a left turn towards her home. As she was turning, she was struck from behind by Turner's vehicle. Fransen denied signaling a right turn or moving into the right turn lane, stating she would have had no reason to do so because her home lay in the opposite direction.

The police officer that investigated the crash determined it occurred as Turner described based on the damage to the vehicles and their resting places on the road after the accident and his conversation with Turner at the scene. He did not speak with Fransen. Turner sued Fransen for the injuries she claimed to have sustained in the accident.

At the jury trial, Turner presented the testimony of an accident reconstructionist, whose opinion was aligned with the officer that investigated the accident. This expert explained the damage to the Neon, which was limited to the right front of the car, suggested it was "not a true rear-end collision." He stated that had it been "a straight-on rear collision, you would expect the front end to be collapsed all the way across." He also found it significant that the damage to the Cherokee was confined to its undercarriage with no damage to the rear bumper.

Despite the expert testimony in Turner's favor, the jury returned a verdict finding Fransen was not at fault in the accident. Turner filed a motion for new trial, alleging that after the trial she learned a juror had told the others that the juror's son "had a Jeep Cherokee with a lift and that it was dangerous and unstable." Turner believed this information had adversely influenced the jury, who heard testimony from Fransen that her Cherokee had been similarly equipped with a suspension lift kit. Turner additionally claimed the verdict was not sustained by sufficient evidence and the district court erred in not giving a requested jury instruction. The court rejected all of these grounds for relief.

Turner appeals.

II. Scope and Standards of Review.

The denial of a motion for new trial is reviewed based on the grounds asserted in the motion. *See Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012). The claims of juror misconduct and instructional error present discretionary grounds for relief and are accordingly reviewed for an abuse of discretion. *See Giltner v. Stark*, 219 N.W.2d 700, 710 (Iowa 1974) (juror misconduct); *Schmitt v. Koehring Cranes, Inc.*, 798 N.W.2d 491, 495 (Iowa Ct. App. 2011) (refusal to give a requested instruction). The sufficiency of the evidence, on the other hand, presents a legal question. *Fry*, 818 N.W.2d at 128. We therefore review this ground for the correction of errors at law. *Id.*

III. Discussion.

A. Juror Misconduct.

We begin our analysis with the meat of Turner's appeal—her claim of juror misconduct. In an affidavit attached to Turner's new trial motion, the forewoman of the jury claimed as follows:

> During the jury discussion, one of the jurors reported that she knew about Jeep Cherokees like Mrs. Fransen's because a member of her family, her son, had a Jeep Cherokee that had a lift on it, and that it was unstable and could roll over. Her son would not allow his girlfriend to ride in it because it was danger[ous] and could roll over.

Turner claims the information provided by the juror was "extraneous prejudicial information" entitling her to a new trial. *See* Iowa R. Civ. P. 1.1004(2). We disagree, though our courts' cases on this point are not in complete accord.[1]

[1] In reaching this conclusion, we have disregarded that portion of the affidavit that explains how the information affected the jury's deliberations. *See Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988) (adopting the federal courts' construction of the

The parameters of an inquiry into claims of juror misconduct are set forth in Iowa Rule of Evidence 5.606(b):

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except 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.

(Emphasis added.) From this rule, our courts have developed the following three-part test that must be established by the complaining party:

> (1) evidence from the juror must consist only of objective facts concerning 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 deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

Ray v. Paul, 563 N.W.2d 635, 639 (Iowa Ct. App. 1997); *see also State v. Johnson*, 445 N.W.2d 337, 341 (Iowa 1989).

What constitutes "extraneous prejudicial information" within the meaning of rule 5.606(b) has never been discussed at length by our courts, though the Iowa Supreme Court has recognized that jurors "undoubtedly discuss a variety of subjects in considering cases." *State v. Lass*, 228 N.W.2d 758, 771 (Iowa 1975). "It is a fact that jurors will bring with them to deliberations their life experiences.

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comparable federal rule of evidence, "which protects each of the components of deliberation including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room"); *State v. Houston*, 209 N.W.2d 42, 45 (Iowa 1973) ("To justify a new trial for jury misconduct it must appear (independently of what jurors might later say) the misconduct was calculated to, and probably did, influence the verdict.").

Indeed, how jurors perceive the evidence and judge the credibility thereof will be indubitably shaded by such experiences." *Lopez v*. *Aramark Uniform & Career Apparel*, *Inc*., 417 F. Supp. 2d 1062, 1073 (N.D. Iowa 2006). Jurors are "'not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but may give effect to such inferences as common knowledge or their personal observation and experience may reasonably draw from the facts directly proved.'" *State v*. *Stevens*, 719 N.W.2d 547, 552 (Iowa 2006) (citation omitted).

> "Discussion and deliberation in the jury room would be idle form if jurors were bound to refrain from illustrating or emphasizing their views by reference to any matter or thing which they have found to be true or false in their individual experience, and if verdicts were to be held vitiated thereby the jury system would better be abandoned altogether."

Houston, 209 N.W.2d at 45 (citation omitted).

"The fact that unforeseen evidence falls within the expertise of a juror does not render it extraneous." *State v*. *Heitkemper*, 538 N.W.2d 561, 564 (Wis. Ct. App. 1995); *see also Marquez v*. *City of Alburquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) ("A juror's personal experience . . . does not constitute 'extraneous prejudicial information.'"). Indeed, as a federal court has acknowledged, "Evaluation of credibility necessarily relies on experience." *Grotemeyer v*. *Hickman*, 393 F.3d 871, 879 (9th Cir. 2004) (noting a study that found fifty percent of the jurors' time is spent discussing personal experiences). "One great advantage of jurors over judges is their diversity of experiences." *Id.*

> Ideally, at least someone on a jury of twelve will be able to contribute to the rest of the jury some useful understanding about whatever evidence comes up. It is probably impossible for a person who has highly relevant experience to evaluate the

> credibility of witnesses without that experience bearing on the evaluation. Were we to require the impossible and prohibit jurors from relying on relevant, past personal experience, about all we would accomplish would be to induce jurors to lie about it when questioned afterward, unless we limited jury participation to the most unworldly and ignorant individuals.

Id. at 880; *see also United States ex rel*. *Owen v*. *McMann*, 435 F.2d 813, 818 (2d Cir. 1970) ("All must recognize, of course, that a complete sanitizing of the jury room is impossible.").

That is not to say, however, "that *all* juror experience is proper grist for the deliberative mill." *Grotemeyer*, 393 F.3d at 880. For example, a juror may not bring into the jury room evidence developed outside the witness stand, such as the results of a juror's experiment conducted while the jury was on a weekend recess, legal research performed during the trial, or knowledge gained outside of court that the defendant has previously been convicted of a felony. *See*, *e*.*g*., *State v*. *Henning*, 545 N.W.2d 322, 324-25 (Iowa 1996) (reversing denial of new trial in OWI prosecution where during extended break in deliberations several jurors learned from a television program the defendant had three prior OWI convictions); *State v*. *Wells*, 437 N.W.2d 575, 580 (Iowa 1989) (finding it beyond dispute that a juror's independent visit to a crime scene to test the State's diagram was misconduct); *Fischer*, *Inc*. *v*. *Standard Brands*, *Inc*., 204 N.W.2d 579, 586 (Iowa 1973) (concluding new trial should have been granted where a juror conducted an experiment on a key point in plaintiffs' case) *overruled on other grounds by Ryan*, 422 N.W.2d at 494.

Turner likens the juror's statements in this case to outside research or the performance of an experiment. Other courts, however, have distinguished

between the two. In the closely analogous product liability case of *Wilson v. Vermont Castings*, 977 F. Supp. 691, 693 (M.D. Pa. 1997), where the plaintiffs sought damages for a malfunctioning woodburning stove, a juror who owned the same type of stove told the other jurors about her experience with the product. The court rejected the plaintiffs' post-trial claims of juror misconduct, stating,

> This is not a situation in which a juror went out on his or her own, performed an experiment for the express purpose of testing the evidence, then relayed the results to the other jurors. This was simply a matter of a juror drawing upon prior life experiences and using them in the course of deliberations.

Wilson, 977 F. Supp. at 695.[2]

The same can be said here. The juror did not go out and perform an experiment to test the evidence presented by Turner. Nor did she conduct any independent research outside of court. She instead simply told the other jurors about her own experience with a vehicle similar to Fransen's. "When such information becomes part of the deliberative process, it becomes sacrosanct under Rule 606(b)." *Id.*; *accord Lopez*, 417 F. Supp. 2d at 1073.

We recognize two older Iowa cases cited by Turner have found misconduct in situations similar to this one. In the first, a trip and fall case, the Iowa Supreme Court found a juror's statements during deliberations regarding "his personal knowledge relating to the sidewalk in question" may have affected the verdict and was prejudicial, warranting the trial court's grant of a new trial. *See Wilberding v. City of Dubuque*, 82 N.W. 958, 958 (Iowa 1900). And in the

[2] The same juror also reviewed the instruction manual for her own stove to see what warnings were given and told the other jurors what she had found. *Wilson*, 977 F. Supp. at 693. The court found this was "extraneous to the jury's deliberations, since it was not part of the evidence in the case." *Id.* at 695. But it found the information to be non-prejudicial. *Id.*

second, a personal injury action arising out of a car accident, two jurors told the others about their experiences in driving the same stretch of road where the accident occurred. *See City Nat'l Bank v*. *Steele*, 263 N.W. 233, 233 (Iowa 1935). The court found these statements "had a direct bearing on the issue of reckless driving and tended to dispute a proposition, proof of which was essential to plaintiff's right to recover and the establishment of which it was the duty of the juror to pass upon," thereby necessitating a new trial. *Id.*

These cases may be narrowly, and perhaps somewhat artificially, distinguished on the ground that the jurors' statements involved the exact same instrumentalities at issue in the case, i.e. the same road and the same sidewalk, whereas the juror's statements in this case related to a different though similar type of car. *See Owen*, 435 F.2d at 818 (drawing the line at jurors' consideration of extra-record facts "about the specific defendant then on trial"); *accord United States v*. *Benally*, 546 F.3d 1230, 1238 (10th Cir. 2008) (asking whether the claimed improper information imparted by certain jurors concerned "specific facts about [the defendant] or the incident in which he was charged"). They also predated our adoption of rule 5.606(b), which changed the manner in which we determined what evidence of misconduct was allowable. *See Ryan*, 422 N.W.2d at 494-95 (discussing Iowa common law concerning the competency of jurors to testify about their deliberations in relation to rule 5.606(b)). Later cases on the subject favor Fransen. *See*, *e.g*., *State v*. *Folck*, 325 N.W.2d 368, 372-73 (Iowa 1982) (affirming denial of new trial motion where one of the jurors "supplied the jury with information concerning the place where . . . one of defendant's alibi witnesses lived," another juror made statements about the location of a shelter

house discussed at trial, and a different juror said that patrons of a certain bar were not to be believed); *Lass*, 228 N.W.2d at 771 (finding no juror misconduct where several jurors related personal observations of individuals experiencing hypoglycemic and diabetic attacks in a case in which experts disagreed as to whether defendant suffered from hypoglycemia).

Most importantly, however, we believe Turner has failed to show "the misconduct was calculated to, and with reasonable probability did, influence the verdict." *Ray*, 563 N.W.2d at 639. This is an admittedly hard showing for an aggrieved party to make. *See Johnson*, 445 N.W.2d at 342. The trial court has broad discretion in determining whether alleged misconduct of the jurors is prejudicial. *See Lass*, 228 N.W.2d at 771. "As a practical matter, courts cannot be too strict on jury discussions or few verdicts could stand." *Id*. We have historically "considered such situations with a bemused but limited tolerance for the ingenuity of jurors and the realization a rigid approach would result in interminable litigation." *Houston*, 209 N.W.2d at 45.

In resolving the question of the misconduct's effect on the verdict, "the trial court may 'examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented before making a common-sense evaluation of the alleged impact of the jury misconduct.'" *Johnson*, 445 N.W.2d at 342 (citation omitted). The trial court in this case did just that, finding that to

> determine Fransen's fault, the jury was required to decide whether she commenced her left turn from the right turn lane or not. The jury could have concluded the higher Jeep would have flipped onto its side under either scenario—Fransen turned left from the right turn lane and cut across Turner's path as she proceeded straight

> through the intersection, or Fransen was in the proper lane, commenced her left turn, and Turner swerved to her left prior to impact.

We find no abuse of discretion in this ruling and turn to the question of whether the verdict was sustained by sufficient evidence.

B. Sufficiency of the Evidence.

In examining the record to determine whether the jury's findings are supported by substantial evidence, "we must view the evidence in the light most favorable to the verdict, taking into consideration all reasonable inferences the jury may have made." *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 16 (Iowa 2000). The factual issue of negligence is for the jury to resolve "and only in exceptional cases" may it be decided as a matter of law. *Id.*; *see also* Iowa R. App. P. 6.904(3)(j). This is not one of those exceptional cases.

The jury heard two different versions of how the accident occurred. Turner testified Fransen signaled a right turn and moved into the right turn lane, but then abruptly turned left in front of her, while Fransen testified she was rear-ended while making a properly signaled left turn from the proper lane. The jury was entitled to reject Turner's version of the accident in favor of Fransen's, despite the expert testimony supporting Turner's version. *See Jackson v. Roger*, 507 N.W.2d 585, 589 (Iowa Ct. App. 1993) ("The jury, as finder-of-fact, has the ability to accept or reject testimony, even if it is uncontroverted.").

Turner vigorously argues the physical evidence supports only her version of how the collision occurred, and contends reasonable minds could come to no other conclusion than that Fransen was negligent as a matter of law. Upon a careful reading of the trial testimony, we, like the district court, disagree. The

physical evidence, according to Turner's witnesses, is consistent with Turner's version of the collision events and is not indicative of a straight-on rear-end collision or other scenarios posed by Turner's counsel. But, the evidence presented by Turner at trial was neither indisputable nor so conclusive or unequivocal as to exclude any version of events but Turner's. A reasonable jury could have concluded the evidence presented at trial was consistent with Fransen's version of the events that she was in the process of turning when struck by Turner. In any event, a court has no right to set aside a jury verdict just because it might have reached a different conclusion. *Lubin v. Iowa City*, 131 N.W.2d 765, 767 (Iowa 1965).

> In jury trials controverted issues of fact are for the jury to decide. That is what juries are for. To hold that a judge should set aside a verdict just because [the judge] would have reached a different conclusion would substitute judges for juries. It would relegate juries to unimportant window dressing. That we cannot do.

Lantz v. Cook, 127 N.W.2d 675, 677 (Iowa 1964).

While Turner is able to point to evidence supporting her position, so too can Fransen. *See Meirick ex rel. Meirick v. Weinmeister*, 461 N.W.2d 348, 350 (Iowa Ct. App. 1990) ("[W]e cannot say, in view of the conflicting testimony, that the burden was so strong, so overwhelming, as to compel a finding of negligence as a matter of law."). The jury was presented with evidence that Turner was talking on her cell phone at the time of the accident. Turner reluctantly admitted this point on cross-examination only after being confronted with her cell phone records and even then stated that if she had been using her cell phone, it would have been with a hands-free device. The jury was entitled to consider this equivocal testimony, and Turner's possible distraction at the time of the accident,

in reaching its decision. *See id.* at 349 ("A trier of fact has the duty to weigh evidence and ascertain the credibility of witnesses."). We find no error of law in the district court's denial of Turner's new-trial motion on this point.

C. Instructional Error.

Turner finally claims the district court erred in refusing to give the following jury instruction:

> The driver of a vehicle intending to turn left at or within an intersection shall yield the right of way to all vehicles, that are so close to the intersection as to be an immediate danger. Then the driver having yielded and having given the required signal, may turn left. A violation of this law is negligence.

This instruction is based on Iowa Civil Uniform Jury Instruction Number 600.37 and Iowa Code section 321.320 (2009) but is missing a key part of those provisions.

The uniform instruction reads in its entirety:

> The driver of a vehicle intending [to turn left within an intersection] . . . shall yield the right-of-way *to all vehicles approaching from the opposite direction which are at the intersection* or so close to the intersection as to be an immediate danger. Then the driver, having yielded and having given the required signal, may make the left turn. A violation of this law is negligence.

Iowa Civ. Jury Instructions 600.37 (emphasis added); *accord* Iowa Code § 321.320. We agree with Fransen that this instruction is applicable to situations where there is a vehicle approaching from the opposite direction. *See*, *e.g.*, *Banghart v. Meredith*, 294 N.W. 918, 919 (Iowa 1940) (interpreting prior version of code section as requiring "that a car, about to make a left turn at an intersection, yield the right of way to a vehicle approaching from the opposite

direction so close thereto as to constitute an immediate hazard"). That was not the case here.

Because Turner's requested instruction was not a correct statement of the law having application to the facts of the case, the district court did not err in refusing to submit it to the jury. *See Herbst v*. *State*, 616 N.W.2d 582, 585 (Iowa 2000). We additionally find that Turner has not shown any prejudice resulted from the court's failure to give the requested instruction. *See Banks v*. *Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009) ("'A district court's failure to give a requested instruction does not require a reversal unless the failure results in prejudice to the party requesting the instruction.'" (citation omitted)). We accordingly affirm the district court on this ground as well.

***IV*. *Conclusion*.**

The district court did not err in denying Turner's motion for new trial. We conclude the juror's statements during deliberations regarding her experience with a vehicle similar to Fransen's were not the type of "extraneous prejudicial information" entitling Turner to a new trial. We further conclude the jury's verdict in favor of Fransen was sustained by sufficient evidence and unaffected by instructional error. The judgment of the district court is affirmed.

AFFIRMED.

Potterfield, J., concurs; Vogel, P.J., concurs in part and dissents in part.

Vogel, J. (concurring part; dissenting in part)

I agree with the majority's recitation of the law regarding a sufficiency-of-the-evidence claim, however, I must depart from its conclusion. While we are normally reluctant to upset a jury verdict, we should do so here because there is no physical evidence to support Fransen's account of the accident.

When a party challenges the sufficiency of the evidence to support the jury's factual findings, we examine the record in the light most favorable to the verdict. *Boham v. City of Sioux City*, 567 N.W.2d 431, 435 (Iowa 1997). In this case, the record before us is completely devoid of any facts supporting Fransen's version of how the collision occurred. On the other hand, Turner's burden was to prove her claim by a preponderance of the evidence, and I believe the record clearly demonstrates she did so. The testimony of two experts, including the unbiased testimony of the police officer who investigated the collision, concluded the accident occurred as Turner described. The police officer's testimony and the independent expert's testimony were at all times consistent with the physical evidence, including the angle and location of the vehicles after impact, the damage to the right passenger side of the Neon, and the trail of the Neon's fluids indicating the vehicle did not swerve to the left immediately before impact.

Even looking at the record in the light most favorable to the verdict, the only minutia of evidence supporting Fransen's account from the record—and emphasized by the majority—is Turner's possible distraction while using her cell phone at the time of the accident. But whether Turner was distracted is irrelevant to the credibility of the concrete accident reconstruction and physical evidence as detailed in the expert testimony. Moreover, Turner's reluctance to admit she was

using her cell phone at the time of the accident only reflects on her credibility, not the credibility of the non-biased investigating police officer, the expert witness, or the uncontroverted physical evidence. This is not a case where there are two conflicting yet plausible stories and the jury chose an outcome I would not have chosen. This is a case with only one plausible story—Turner's story—based on the indisputable physical evidence. To reach the contrary conclusion is to ignore the laws of physics. I would therefore find insufficient evidence to support the verdict, and reverse and remand for a new trial.