

IN THE COURT OF APPEALS OF IOWA

No. 6-913 / 05-2005
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDWARD ALLEN BOHNSACK,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Fredrick E. Breen, District Associate Judge.

Defendant appeals from his convictions for third-degree burglary, as an habitual offender, and possession of burglary tools. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Timothy N. Schott, County Attorney, and Ricki Osborn, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Edward Bohnsack appeals from his convictions for third-degree burglary, as an habitual offender, and possession of burglary tools. He argues the district court erred in denying his motion to excuse a juror for cause and in denying his motions for mistrial and for new trial based on jury misconduct. He also raises a claim of ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings

The morning of trial, Barb Besch, defense counsel's secretary, overheard a conversation about Bohnsack between three potential jurors who had noticed Bohnsack napping during jury selection. A potential male juror commented to two female jurors, later identified as Dawn Donnelly and Kathleen Anderson, "I sure would be paying a lot more attention if I was in his [Bohnsack's] shoes." The male juror was not identified. According to Besch, one of the two women, whom she could not identify, agreed with the male juror's comments. Besch believed that potential juror Christine Bloom, who was sitting next to Donnelly, also probably heard the conversation.

After Besch informed defense counsel of the conversation, and counsel in turn informed the district court, Kathleen Anderson was removed for cause. Dawn Donnelly was questioned about the conversation and her ability to be impartial. Donnelly admitted she and two other jurors spoke about Bohnsack's demeanor and "the fact that he was napping." Donnelly admitted that "if it was me sitting up there, I wouldn't be napping." She believed, however, she could be a fair and impartial juror and explained that she presumed Bohnsack to be innocent.

Bohnsack's counsel moved to excuse juror Donnelly for cause. The district court denied the motion:

I don't see any cause for excusing this panelist. She accepts the presumption of the defendant's innocence in a way the last panelist who was excused did not. She said she can be fair and impartial. She has views about people who commit thefts, that they should be punished if convicted. That doesn't mean she's made a judgment about this gentleman's guilt or innocence.

Following the denial of his motion to excuse juror Donnelly for cause, Bohnsack's counsel moved for a mistrial based on the conversation about Bohnsack sleeping during voir dire. The court denied the motion but allowed Bohnsack to continue examining potential jurors about the conversation.

Christine Bloom testified she heard the conversation between jurors Donnelly and Anderson, but did not participate in it. From where she was seated, Bloom could not tell if Bohnsack was sleeping. During the morning break, Bloom heard potential juror Stephanie Vote ask a group of people outside smoking if anyone had seen Bohnsack falling asleep. (The district court had dismissed Vote prior to Bloom's testimony.) Bloom testified the conversations she overheard had not affected her opinion about Bohnsack's guilt or innocence.

Juror Brian Fishel testified the only time he heard mention of Bohnsack's demeanor was during counsel's examination of potential juror Vote. He had not been paying attention to the other jurors, nor did he participate in the conversation outside during the break.

Juror Kari Johnson testified she had not heard comments about Bohnsack's demeanor, other than during counsel's examination of potential juror

Vote. She had not witnessed Bohnsack acting sleepy or acting like he was not paying attention.

Juror Thomas Flagg recalled Vote's comment during counsel's examination of her, but testified he had not heard similar comments about Bohnsack's demeanor from other jurors. He had not seen Bohnsack sleeping.

Bohnsack renewed his motion for a mistrial following the examination of the jurors. The district court again denied the motion. It noted that defense counsel had

scrupulously gone through all of the panelists . . . and secured their statement that they can be fair and impartial despite the fact that they, apparently, heard Ms. Vote voice her concern early on in the proceedings. So her statements at that time are not grounds for a mistrial.

. . . .

I think that the whole thrust of the evidence is that we've excused one juror [Anderson] who—for reasons really not related to the statements in question but because she had kind of a—just a fifty-fifty impression of the defendant's guilt or innocence, which is more opinion than she has any right to have at this time and she could not accept the presumption of innocence even if she was instructed to do so. None of the other jurors have declared that to be any problem or concern, that is, panelists that we examined. We're still in the process [of] examining the jury. . . . And so the motion for mistrial is overruled.

The jury convicted Bohnsack of third-degree burglary and possession of burglar's tools. Bohnsack stipulated to his prior convictions and admitted his status as an habitual offender. The district court denied Bohnsack's motion for a new trial and sentenced him to fifteen-year and two-year indeterminate terms of incarceration on the two convictions, to be served consecutively. Bohnsack appeals.

II. Standard of Review

We review the district court's denial of Bohnsack's challenge of juror Donnelly for cause for an abuse of discretion. *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993). Similarly, our review of the court's denial of Bohnsack's motions for mistrial and new trial is for an abuse of discretion. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997); *State v. Lawrence*, 559 N.W.2d 292, 294 (Iowa Ct. App. 1996).

III. Discussion

Challenge for Cause. The test applied in ruling on challenges for cause under Iowa Rule of Criminal Procedure 2.18(5)(k) is “whether the juror holds such a fixed opinion that he or she cannot judge impartially the guilt or innocence of the defendant.” *Neuendorf*, 509 N.W.2d at 746 (citation omitted). Juror Donnelly was questioned about her ability to be fair and impartial. Based on her responses, the district court found, “She accepts the presumption of the defendant's innocence” The record shows the district court properly exercised its discretion in denying Bohnsack's challenge for cause.

Motion for Mistrial. We assume without deciding a motion for mistrial was proper in this case. *Cf. Wilkins v. State*, 583 S.E.2d 905, 907 (Ga. Ct. App. 2003) (motion for mistrial was premature where alleged juror misconduct occurred before the jury had been sworn or trial had begun; proper motion was “for the removal and replacement of the individual jurors”). Bohnsack argues that mistrial was appropriate because “at least one juror, and perhaps more due to jury contamination, faced ineligibility due to a propensity to use the pretrial observations in question as a reason to find defendant guilty.”

In light of the statements elicited from potential jurors, as outlined above, the district court acted within its discretion in denying the motion for mistrial. The two potential jurors who expressed an opinion of the defendant not based upon objective facts were excused. The remainder of the jurors either did not hear or were not affected by other jurors' comments or Bohnsack's actions. The district court acted well within its discretion in denying the motion for mistrial.

Motion for New Trial. Bohnsack's brief includes no argument related to the district court's alleged failure to grant a new trial based on juror misconduct. Accordingly, he has waived this issue on appeal, and we need not address it. Iowa R. App. P. 6.14(1)(c).

IV. Ineffective Assistance of Counsel

Other than citing case law relevant to ineffective assistance of counsel claims, Bohnsack offers no specifics as to counsel's errors or omissions or how he was prejudiced thereby. Therefore, we are left with nothing to review. *Id.*

AFFIRMED.