IN THE COURT OF APPEALS OF IOWA

No. 2-820 / 09-1231
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS ANTOINE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs (*Watson* hearing) and Robert E. Sosalla (trial), Judges.

Curtis Miller appeals his conviction for felony involuntary manslaughter and child endangerment resulting in death. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas Maybanks and Laurie Craig, Assistant County Attorneys, for appellee.

Heard by Danilson, P.J., and Tabor and Bower, JJ.

TABOR, J.

This appeal raises questions of jury separation and juror substitution. Facing charges of first-degree murder and child endangerment resulting in death, Curtis Miller stood trial for nearly three weeks. After the jury began its deliberations, the district court approved a juror's request to leave the state for a family funeral, but allowed the juror to deliberate for two days before his departure. Miller twice moved for a mistrial based on the court's decision to allow the juror to deliberate and then separate—without a definite return date.

After the court denied his mistrial motions, Miller agreed to the court's proposed substitution of an alternate juror rather than waiting at least one week for the jury to resume its deliberations. The newly comprised jury convicted Miller of felony involuntary manslaughter and child endangerment resulting in death. Miller appeals, challenging the district court's denial of his mistrial motions, counsel's acquiescence in the substitution of an alternate juror, the proof of his specific intent to commit serious injury, and counsel's failure to object to the jury instruction on involuntary manslaughter and expert testimony on the profile of child abusers. He also alleges counsel labored under a conflict of interest.

Because the court allowed a juror to begin deliberations and then separate from the rest of the jury without any certainty as to when deliberations would resume, we believe the defense motions for mistrial should have been granted. We do not find Miller waived appellate review of the mistrial rulings by subsequently agreeing to the court's proposal to substitute an alternate juror

rather than waiting for the separated juror's return the following week. We reverse and remand for a new trial.

I. Background Facts and Procedures

Curtis Miller and Brandy Turley had two children in common: I.M. born in January 2006 and K.M. born in June 2007. After K.M.'s birth, the family moved in with Brandy's cousin Heather Lamb in Springville. In September 2007, the family drove to visit Miller's mother and sister in Indiana. During the visit, Brandy was arrested on an outstanding warrant. Miller returned to Iowa with his two young daughters while Brandy remained in jail.

Miller was caring for his daughters on the morning of September 20, 2007. The only other adult present in the home was Heather's father-in-law, Jerry Lamb, who was visiting from Arizona. Jerry recalled watching television in the living room when he heard Miller's voice from upstairs imploring: "Why are you crying? Won't you stop crying, I don't know what's wrong with you." Jerry next heard water running in the upstairs bathroom. Jerry then went to take a shower and eventually noticed Miller had driven off with K.M., leaving I.M. alone watching television.

Miller testified he was on the telephone upstairs with his mother-in-law when he heard K.M. crying: "a real dramatic cry like something was wrong." He ended the call and went downstairs to find the baby "laying in her swing like she was real tired." He said he then placed K.M. in her bassinet while he attended to I.M.'s dirty diaper. When he was running a bath for I.M., he heard K.M. "making weird noises" like she was choking or coughing. He recounted in his testimony

that K.M. was not breathing right, so he grabbed her, and drove off—without taking time to strap in the baby seat.

Miller drove frantically from Springville to a fire station in Marion. At the station, paramedic Jeff Van Ersvelde found K.M. to be "breathless, pulseless," and "very pale." He also noticed a small bruise on her forehead. Van Ersvelde performed CPR until the baby was rushed by ambulance to St. Luke's Hospital in Cedar Rapids. An emergency room nurse noticed three bruises on the baby's face that looked as if someone had "palmed" her head. When assessing K.M.'s neurological state, emergency room doctor Michael Miller found her pupils were dilated and did not react to light. Both eyes showed signs of subconjunctival hemorrhages. Dr. Miller was able to "get her pulse back"—but told Miller she was "very sick."

St. Luke's radiologist Glen Hammer performed a CT scan of K.M.'s head and found she had suffered a skull fracture. He explained an infant's skull is flexible because the sutures are still open and it would require a "significant trauma" to cause such a fracture. He compared the necessary force to a "high-speed car accident." In viewing the image of K.M.'s skull, Dr. Hammer also detected a small amount of bleeding between the skull and the brain; the brightness of the blood indicated to the doctor that the injury was recent.

Dr. Scott Nau treated K.M. in St. Luke's pediatric intensive care unit. He found she had extensive retinal hemorrhages in both eyes. He believed her sudden deterioration was caused by non-accidental trauma to her head. Dr. Nau told Miller he would likely be a suspect in an abuse investigation. Miller

suggested to Dr. Nau that Jerry Lamb, the other adult in the house, might have been upset with K.M. for crying.

The next day, K.M. was transferred to the University of Iowa Children's Hospital in Iowa City. Pediatric specialist Keala Clark found K.M.'s brain had begun to swell. Dr. Clark explained brain swelling peaks at between forty-eight and seventy-two hours after the injury. Dr. Clark examined a second CT performed on K.M., finding the swelling had worsened, and there was more blood in the ventricles and between the two hemispheres of the baby's brain. Dr. Clark noted the bleeding was not directly related to K.M.'s skull fracture. In Dr. Clark's view, it would have taken "significant force" to cause the extent of injuries.

Dr. Clark also reviewed a skeletal survey of K.M., finding the three-month-old had suffered two wrist fractures. The doctor opined the presence of those broken radial bones added more weight to the conclusion that K.M. endured inflicted trauma: "It's harder to explain an isolated event that would cause the constellation of presenting symptoms or injuries that she had." Doctors placed K.M. on a ventilator to help her breath. The higher levels of her brain were not functioning, and her condition did not improve.

When pediatric ophthalmologist Richard Olsen examined K.M.'s eyes, he discovered hemorrhages in all layers of the retina; "they numbered in the hundreds, perhaps thousands, too numerous to count really." He also found a macular fold, which was an area of the retina that was "crinkled like cellophane." Dr. Olsen described K.M.'s symptoms as "the classic appearance for abusive head trauma." In his opinion, the macular fold indicated "something very brutal"

had happened—"we just don't see these very often." Dr. Olsen, who had been on staff at the University of Iowa Hospitals for seven years, remarked that K.M.'s retinas "looked as badly traumatized" as he had ever seen in a patient.

When they learned of K.M.'s grave condition, authorities allowed Brandy to return to Iowa on her own recognizance. On September 25, 2007, Dr. Clark spoke with both parents about removing K.M. from life support, but they declined. That same day, Miller and Brandy got married at the Linn County courthouse. On September 28, 2007, officers from the Linn County sheriff's office arrested Miller for child endangerment. They decided to do so after learning that Miller and Brandy had plans to leave the state. In an interview with detectives, Miller took responsibility for K.M.'s injuries and apologized for casting aspersions onto Jerry Lamb. Miller also suggested that maybe his unsafe driving on the way to the fire station caused K.M.'s injuries.

In conversations with his brother from jail, Miller said: "Don't let Brandy unplug [K.M.] . . . They'll lock me up for life." Brandy did decide to remove K.M. from life support on October 10, 2007. The baby died the next day.

On October 18, 2007, the State filed a two-count trial information, charging Miller with murder in the first degree, in violation of Iowa Code section 707.2(2) and 707.2(5) (2007), and child endangerment resulting in death, in violation of Iowa Code section 726.6(1)(a), .6(1)(b) and 726.6(4). The jury returned a verdict of guilty on the child endangerment count. The jury acquitted Miller on the murder count, but convicted him of the lesser included offense of felony involuntary manslaughter, in violation of section 707.5(1). The court merged the

manslaughter count into the child endangerment offense, entering judgment only on the greater crime. Miller appeals from the judgment entered in his case.

II. Scope and Standards of Review

We review the district court's denials of Miller's motions for mistrial for an abuse of discretion. *See State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). "A mistrial is appropriate when 'an impartial verdict cannot be reached' or the verdict 'would have to be reversed on appeal due to an obvious procedural error in the trial.'" *Id.* The question in this case is whether allowing the jury to deliberate and then separate, causing a choice between substituting an alternate juror or holding the deliberations in abeyance for a week, was an obvious procedural error requiring the grant of the defense motion for mistrial.

III. Analysis

Miller contends he is entitled to a new trial because the district court's substitution of an alternate juror after the jury had been deliberating for two days violated Iowa Rule of Criminal Procedure 2.18(15). The language of the rule bearing on this question reads as follows: "Alternate jurors shall . . . replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged." Iowa R. Crim. P. 2.18(15).

Our court has interpreted this rule as prohibiting the substitution of alternate jurors for seated jurors during deliberations. *State v. Escobedo*, 573 N.W.2d 271, 276 (Iowa Ct. App. 1997)[1]. "Our rules only permit the replacement

[1] At the time we decided *Escobedo*, Federal Rule of Criminal Procedure 24(c) did not permit the replacement of a juror during deliberations. The rule was amended in 1999 to allow federal courts to retain alternate jurors after the jury retires to deliberate. *See* Fed. R. Crim. P. 24(c)(3).

of a regular juror prior to the commencement of the deliberations and require alternate jurors to be discharged after the deliberations begin." *Id*. *Escobedo* determined the district court lacked authorization to replace a juror during deliberations, and the defendant would have been entitled to a mistrial, had he sought one. *Id.* But because the defendant acquiesced in the replacement of the dismissed juror, our court held the defendant waived the jury irregularity. *Id*. at 276–77.

The procedural posture of the instant case is similar to the situation analyzed in *Escobedo*. In the early afternoon of Thursday, April 30, 2009, the district court directed a twelve-member jury to start its deliberations. But the court did not discharge the two alternate jurors as required by rule 2.18(15). Instead, the court gave them the following advisory:

> [E]ven though you're not a part of the jury at this point, until the jury reaches a verdict, my prior admonition that I gave to you still applies. In the event for any reason one of the jurors is unable to complete the deliberations, one of you will be taking that juror's position and will be stepping into the deliberations.

The court did not ask either the prosecutor or the defense attorney if they agreed to keep the alternate jurors on call, in contravention of the rule as it was interpreted in *Escobedo*.

Also on Thursday, April 30, one of the seated jurors, Burgess, told court personnel that his nephew had been fatally stabbed in Colorado and he needed to join his wife there for the funeral. Burgess told the court attendant "[h]e could deliberate that day, but he would have to leave Friday," May 1, 2009. The district

court directed the jury to deliberate[2] until 3 p.m. on Friday and then allowed juror Burgess to leave town.

On Monday morning, May 4, 2009, the court made a record concerning the jury situation. At that conference the trial judge told counsel he made the decision to allow juror Burgess to deliberate and then excused him to go to the funeral, but did not discharge him. The court did not believe it was necessary to make a record until "such time [the juror] was no longer available." The court gave Miller the option of allowing one of the alternate jurors "to step in to that juror's spot so that deliberations could continue" or to "simply wait for the juror to return." The court noted that if Miller chose the second option: "We will put the deliberations on hold, and once the juror is back, the deliberations will continue."

The court stated that when the juror returned and before deliberations resumed

> I fully intend at that time to make a further record with this individual to make sure nothing in the interim has interfered with his ability to be a fair and impartial juror. If there is anything that interferes with that, then, yes. If the Defendant does not want to go with the alternate, then the mistrial will be declared. Because that's his choice.

The judge told the parties the juror did not know when he would be back, and the juror had not been in communication with the court since Friday.

Defense counsel objected to the court's decision to allow juror Burgess to continue deliberating with the original jurors until the end of the day on Friday, asserting the deliberations may have been "tainted" by "some pretty good pressure" to reach a verdict before his departure. Counsel moved for a mistrial.

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[2] During their two days of deliberation, the jurors listened to Miller's phone calls from the jail and reviewed his videotaped statement to police.

The prosecutor resisted the mistrial motion, citing Iowa Rule of Criminal Procedure 2.19(5)(h), which allows the court to permit "the jurors to separate temporarily overnight, on weekends or holidays, or in emergencies." The prosecutor asserted: "This juror is only temporarily being allowed to attend to this emergency, and the jury can perform any kind of deliberations when they get back as they already have."

The court denied the mistrial motion, saying: "[w]e will await the return of the twelfth juror." Defense counsel responded that depending upon how long the juror would be absent, the defendant would "reserve the right to replace the juror with the alternate." The court learned later Monday morning that juror Burgess did not plan to return to Iowa until the following Monday. In light of the pending week delay, the defendant again moved for a mistrial. The court overruled the motion. Defense counsel characterized his client as being "stuck between a rock and the proverbial hard place" and decided to acquiesce in the substitution of the alternate "with great reservations."

The court personally addressed Miller, telling him he had the right to a verdict from the original twelve-member jury, and if he agreed to replace juror Burgess with an alternate, "that a new composition of twelve jurors would be the ones who decided on any verdict that's rendered in the case." Miller told the court he agreed to the substitution.

On appeal, Miller argues he was entitled to a mistrial because the district court's decision to allow juror Burgess to leave the state after two days of deliberation placed Miller in the untenable position of waiting a week for Burgess

to return or agreeing to an alternate juror. According to Miller, neither scenario was contemplated by the rules of criminal procedure.

The State contends Miller did not preserve error because he did not object when the court failed to discharge the alternate jurors at the start of deliberations. The State also urges that Miller's appellate argument departs from his position at trial—where he agreed to substitution of the alternate juror after the court denied his motions for mistrial.

We do not find that Miller waived his instant claim by not objecting to the court's sua sponte decision to keep the alternate jurors on call. The court did not consult the parties before admonishing the alternate jurors to continue heeding their oath rather than discharging them as contemplated by rule 2.18(15). Miller contends the court's violation of rule 2.18(15) did not become an issue requiring corrective action "until the district court forced Miller to choose between replacing a juror with an alternate or waiting one week for the juror to return (assuming he would in fact return after a week.)" We agree with Miller's contention. The time for objecting is when the defendant would suffer prejudice from the court's proposed action. *See generally State v. Howard*, 509 N.W.2d 764, 768 (Iowa 1993) (discussing premature objections). The effects of the court's actions were not felt by Miller in a concrete way until juror Burgess was allowed to separate after deliberations began and then replaced with the alternate juror. *Cf. State v. Bullock*, 638 N.W.2d 728, 734 (Iowa 2002) (discussing ripeness doctrine in sentencing context).

We also reject the State's argument that Miller is "changing horses on appeal" by now challenging the substitution that he agreed to at trial. Miller twice moved for a mistrial based on the court's jury management decisions. After denying those mistrial motions, the court confronted Miller with the Hobson's choice[3] of (1) waiting a week or more for deliberations to resume with one juror who left the state for the funeral of a family member who suffered a violent death and an overall jury that would be exposed to outside influences and days removed from hearing testimony or (2) substituting an alternate juror after deliberations had begun, in contravention of rule 2.18(15). To the extent Miller waived the restrictions of rule 2.18(15), the waiver was involuntary. *Cf. United States v. Taylor*, 652 F.3d 905, 909 (8th Cir. 2011) (finding waiver of counsel involuntary where "the defendant is offered the 'Hobson's choice' of proceeding to trial with unprepared counsel or no counsel at all").

Having decided Miller preserved error by twice seeking a mistrial, we move to the critical question: did the district court abuse its discretion in denying the mistrial motions? A district court properly exercises its discretion to declare a mistrial when a verdict could be reached but it would be reversed on appeal due to an obvious procedural error at trial. *See Illinois v. Somerville*, 410 U.S. 458, 464 (1973). The procedural errors on this record involved both rule 2.18(15), which regulates juror substitution, and rule 2.19(5)(h), which governs jury separation.

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[3] In literary usage, a Hobson's choice denotes no choice at all or, in more modern contexts, having two bad choices. Bryan Garner, *Garner's Modern American Usage*, 423 (3d ed. 2009) (tracing origin of phrase to Thomas Hobson, an English hostler who gave customers only one choice in horses, the one closest to the door).

A. Error related to juror substitution

The purpose of rule 2.18(15) is to have the same twelve citizens who elect a foreperson and start deliberating to continue their deliberations until they reach a verdict or a stalemate. The Alaska Court of Appeals described the importance of maintaining the original composition of the jury after deliberations begin:

> One of the primary benefits of having juries decide lawsuits is that the decision is made by a group of people who bring differing personalities, backgrounds, and attitudes to their deliberations. Because the jurors must deliberate and reach their decision as a group, the jurors' decision necessarily reflects an amalgam of their individual insights and analyses. We must presume that the deliberations of an unchanging group of twelve are not equivalent to the deliberations of a group of eleven who are later joined, in the middle of their deliberations, by a twelfth person.

Plate v. State, 925 P.2d 1057, 1061 (Alaska Ct. App.1996).

We decided in *Escobedo* that rule 2.18(15) requires the district court to discharge the alternate jurors after the jury retires for deliberations.[4] *Escobedo*, 573 N.W.2d at 276. The court's failure to follow that requirement in this case constituted procedural error. The court compounded the error by relying on the availability of the alternate jurors to offer Miller an alternative to waiting until the released juror returned from his week-long hiatus. If, as we stated in *Escobedo*,

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[4] We note rule 2.18(5) directs that alternate jurors who are not needed before deliberations "shall then be discharged." In a statute or rule, the drafters use the word "shall" to impose a mandatory duty. *State v. Klawonn*, 609 N.W.2d 515, 521 (Iowa 2000). After our decision in *Escobedo*, the language of the criminal procedure rule on juror substitution remained unchanged. In the context of statutes, when the court has interpreted language in a particular way and the legislature has not amended it, a presumption arises that the legislature is satisfied with the court's interpretation. *General Mortg. Corp. v. Campbell*, 138 N.W.2d 416, 421 (Iowa 1965). Because neither the Iowa Supreme Court nor the state legislature has taken action to amend the rule to permit juror substitution after deliberations begin—despite the fact that other jurisdictions, now including the federal courts, allow such substitution—we presume the correctness of the *Escobedo* interpretation.

a district court is not authorized to replace a juror during deliberations, it follows that a court is not authorized to keep replacement jurors waiting in the wings and then require the defendant to choose between waiving the irregularity or holding the deliberations in abeyance.

Escobedo does not provide all the answers to our present dilemma. In that case, the trial court dismissed a deliberating juror for misconduct, and the defense acquiesced in the court's expressed intent to use a dismissed alternate juror as a replacement. *Id.* at 275. Because Escobedo's attorney did not move for a mistrial, the trial court could not abort the trial without concern that double jeopardy would bar a retrial. *Id*. at 276 n.4. In this case, the trial court did not dismiss juror Burgess, but instead let him start deliberations with the jury and then separate for an undetermined length of time. In addition, Miller did move for a mistrial, twice.

Escobedo and Miller both faced an empty seat in the jury room. In Escobedo's case the juror was gone for good and the defendant's only choices were to approve substitution of an alternate juror or move for a mistrial. Escobedo opted for the former. *Id*. at 276–77. In Miller's case, the return of the juror was uncertain and fraught with the possibility of outside influences and faded memories. We consider that uncertainty in light of rule 2.19(5)(h) on jury separation.

B. Error related to jury separation

Under rule 2.19(5)(h), after the jury retires for deliberations, the court may allow the jurors to temporarily separate overnight, on weekends or holidays "or in

emergencies." The district court learned juror Burgess had a violent death in his family, but did not bring the matter to the attention of the parties until after the juror was allowed to deliberate for two days and then released to travel out of state.[5] Miller argues on appeal the family funeral attended by juror Burgess did not constitute an "emergency" as defined in the rule, contending the rule drafters contemplated "a natural disaster or other situation that impacted the jury as a whole, not the personal situation of an individual juror." We do not find it necessary or useful to define "emergencies" so narrowly. *See Bryant v. State*, 202 N.E.2d 161, 163 (Ind. 1964) (finding emergency when juror was struck with "sudden severe illness" at a restaurant where the jury had gone for supper). The rules governing jury deliberations should be flexible enough for trial courts to manage unexpected events. *See State v. Lowder*, 129 N.W.2d 11, 18 (Iowa 1964) (opining separation of jury was matter primarily within discretion of trial court).

But we do not believe the language in rule 2.19(5)(h) that permits "temporary" separations of the jury after it retires for deliberations contemplates allowing a juror to leave the group for an indefinite period of time. At trial defense counsel addressed the danger associated with delaying deliberations for more than a week: "where these folks, even though they've taken an oath, can certainly be exposed to other extraneous matters."

[5] Our supreme court has advised trial courts to ensure the presence of a criminal defendant during conversations with jurors "even if the conversation seems insignificant." *State v. Wise*, 472 N.W.2d 278, 279 (Iowa 1991).

C. Interplay between substitution and separation rules

The record reveals procedural missteps involving both rule 2.18(15) and rule 2.19(5)(h). Counsel first moved for a mistrial based on the potential "taint" to the jury's deliberations by the court's unilateral decision to allow juror Burgess to participate in two days of deliberation and then separate from the jury for an undetermined amount of time to deal with a family tragedy. The district court denied the motion and ordered that deliberations await the return of the "twelfth juror." We find the court's handling of the juror's situation to be an obvious procedural error that merited the grant of a mistrial.

But even if the court did not abuse its discretion in denying the first mistrial motion, we find the second mistrial motion should have been granted. Counsel renewed his request for a new trial when he learned that deliberations would be delayed for at least one week until juror Burgess returned. A jury separation of more than one week under these circumstances—a violent death in the juror's family—created a procedural irregularity that Miller was not willing to waive. The court acted unreasonably in denying the second mistrial motion.

In light of the procedural errors in jury separation and juror substitution, we reverse and remand for a new trial on the offenses of child endangerment resulting in death and felony involuntary manslaughter. *See Plate*, 925 P.2d at 1062 (finding double jeopardy barred retrial on count for which defendant was acquitted).

We do not address Miller's claims of ineffective assistance of counsel, because the challenged aspects of counsel's performance may not recur on

retrial. *See State v. Sauls*, 356 N.W.2d 516, 519 (Iowa 1984). Neither do we find it necessary to address Miller's sufficiency of the evidence claim, because it is both unpreserved and may not arise during a second trial.

REVERSED AND REMANDED.

Bower, J., concurs; Danilson, P.J., concurs specially.

DANILSON, J. (specially concurring).

I concur specially to address the State's argument that Miller suffered no prejudice. One court has observed that the "discharge of a deliberating juror is a sensitive undertaking and is fraught with potential error." *Commonwealth v*. *Conner*, 467 N.E.2d 1340, 1345 (Mass. 1984). The same can be said about communications and contact between the court and the jury once deliberations begin. Notwithstanding, the State urges us to conclude that prejudice must be shown before granting a new trial. I join in the majority's refusal to wade into such murky waters.

The prejudice standard has been rejected by the ABA Standards for Criminal Justice section 15-2.7 (1986). Commentary to Standard 15-2.7 states, "it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion." The Colorado supreme court has observed:

> Where an alternate juror is inserted into a deliberative process in which some jurors may have formed opinions regarding the defendant's guilt or innocence, there is a real danger that the new juror will not have a realistic opportunity to express his views and to persuade others. *See United States v*. *Phillips*, 664 F.2d 971, 995 (5th Cir.1981), *cert*. *denied*, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982); *United States v*. *Lamb*, 529 F.2d 1153, 1156 (9th Cir.1975). Moreover, the new juror will not have been part of the dynamics of the prior deliberations, including the interplay of influences among and between jurors, that advanced the other jurors along their paths to a decision. *See People v*. *Ryan*, 224 N.E.2d 710, 712 (N.Y. 1966). Nor will the new juror have had the benefit of the unavailable juror's views. *Id*.

People v. *Burnette*, 775 P.2d 583, 588 (Colo. 1989).

The Colorado court also made note of mid-deliberation juror substitution in federal courts,

> The committee history leading to the formulation and adoption of Federal Rule of Criminal Procedure 24(c) indicates that the federal rules committee considered the possibility of permitting an alternate juror to replace a regular juror who becomes disabled during the jury's deliberations, but rejected it after the United States Supreme Court inquired of the committee whether it had satisfied itself that such a procedure would be desirable or constitutional. *See* ABA Standards for Criminal Justice § 15-2.7, at 15-75 (citing L. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962)); *see also United States v*. *Hillard*, 701 F.2d 1052, 1057 (2d Cir. 1983), *cert*. *denied*, 461 U.S. 958, 103 S. Ct. 2431, 77 L. Ed. 2d 1318 (1983). The problem of mid-deliberation juror unavailability in federal court was at least partially resolved in 1983 when Federal Rule of Criminal Procedure 23(b) was amended to allow deliberations to continue with eleven jurors even without stipulation by the parties if it becomes necessary to excuse a juror for just cause during deliberations. A majority of the federal rules committee concluded that this procedure was preferable to allowing alternates to be substituted after deliberations had begun. *See* 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 388 (2d ed. 1988 Supp.).

Id. at 588-89. However, notwithstanding the rule, some federal courts have applied a harmless error standard "when the trial court has used safeguards to neutralize the possible prejudice." *Id.* Ultimately, the Colorado Supreme Court adopted a presumptive prejudice standard that may be overcome if the trial court takes "extraordinary precautions." *Id*. at 590.

The difficulty with the harmless error standard, or for that matter any prejudice standard, "is that any well-intentioned questioning of jurors, original or alternate, in a good faith attempt to provide those safeguards recognized under such an analysis is itself fraught with the potential to contaminate the jury process." *William v. Florida*, 792 So. 2d 1207, 1210 (Fla. 2001) (rejecting the

harmless error analysis and concluding that whenever a juror is unable to proceed a new trial is mandated). Among the issues that arise include: what is the proper procedure for the trial judge to follow; whether, in fact, the trial judge substantially followed the procedures; and the extent to which the error is prejudicial. *See Propriety, Under State Statute or Court Rule, of Submitting State Trial Juror with Alternate after Case Has Been Submitted to Jury*, 88 A.L.R. 4th 711 (1991).

Absent a stipulation to use an alternate juror, our supreme court has only had the opportunity to approve a substitution after deliberations began when the deliberations, if any, were in their infancy. *Kalianov v. Darland*, 252 N.W.2d 732, 737-38 (Iowa 1977) (excusing juror fifteen minutes after deliberations began where no substantial discussion had been engaged). Other courts have similarly permitted substitution when only a brief interval has occurred after submission of the case to the jury. *See United States v. Cohen*, 530 F.2d 43, 48 (5th Cir. 1976); *Cork v. State*, 433 So. 2d 959, 963 (Ala. Crim. App. 1983); *State v. Williams*, 659 S.W.2d 298, 300 (Mo. Ct. App. 1983).

Contrary to the facts in *Kalianov*, here the jury spent nearly two days deliberating before the juror was excused. In that time, certainly the dynamics of the group had developed to a far greater extent than in *Kalianov*. The trial judge did direct the jury to start their deliberations anew, but the trial judge did not ask the jurors if they were able to start their deliberations anew or set aside their prior discussions. Although Miller is not entitled to a perfect trial, he is entitled to the benefit of our criminal procedural rules, and rule 2.18(15) required the alternate

jurors to be discharged. Creating any standard beyond the standard set forth in the rule leads us into the murky waters fraught with danger.