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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR11-747

MARCUS W. FIELDS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 18, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CR 2010-136; CR 2010-137] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Marcus W. Fields was tried before a jury on two counts of second-degree sexual assault. He was acquitted on one count and convicted on the other, for which he was sentenced to twenty years' imprisonment and a $15,000 fine. The verdicts were reached after the jury took an overnight break and resumed deliberations. Fields contends on appeal that the trial court abused its discretion by refusing to poll the jurors when they returned about an article published in the local newspaper that same morning. Finding no abuse of discretion, we affirm.

It is always improper for a juror to receive information about a case except in open court and in the manner provided by law, and the trial court must properly admonish the jury prior to an adjournment. *Capps v. State*, 109 Ark. 193, 159 S.W. 193 (1913); *see* Ark. Code Ann. § 16-89-118(a) (Repl. 2005). The burden is upon the defendant to show that the jury

was improperly influenced during the time that they were apart. *Harkness v. State*, 271 Ark. 424, 609 S.W.2d 35 (1980).

In *Harkness*, prior to a two-day recess during deliberations, the judge admonished the jury not to discuss the case among themselves or with anyone else and "not to read anything in the [newspapers] about the case, or listen to any radio or television reports concerning the case nor permit anyone to read any news report to you regarding the case." *Id.* at 425, 609 S.W.2d at 36. The judge questioned the jurors as a body when court reconvened, making certain that none of them had read any newspaper accounts or articles concerning the trial and that they had not permitted anyone to read such articles to them. The court denied a request by defense counsel to be allowed to question individual jurors further about possible prejudice from publicity or discussion of the case. There was no mention made of specific newspaper articles the jurors might have seen, and there was no showing of prejudice. Our supreme court found no error in the trial court's refusing to allow voir dire of jurors when they returned from adjournment:

> When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate the admonition, without a vestige of proof of its violation, provides no basis upon which a court of review can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct. As an essential of a fair and impartial trial, there is no presumption that the jury is likely to take advantage of every opportunity to disregard the cautionary instructions of the court.

Id. at 426, 609 S.W.2d at 37 (citing *State v. De Zeler*, 230 Minn. 39, 41 N.W.2d 313 (1950)).

In *Capps*, *supra*, the appellant was convicted of first-degree murder in the death of child victims who had been tied to their beds before a fire was set to the home. Our supreme court

reversed and remanded for new trial because the jury housed in a hotel had read, and had been permitted to read, prejudicial newspaper articles relating to the trial. According to testimony by the officer in charge and the hotel proprietor, jurors had read articles in two local newspapers. One article reported that two of the defendant's children, a brother and sister, gave testimony that supported one another's stories and that each child remained "firm" during cross-examination because, "as intimated by the papers, their story was true." *Capps*, 109 Ark. at 203, 159 S.W. at 196. The boy's visible scars of disfigurement were reported as plain evidence of his "close call from death in the flames." *Id.* at 198, 159 S.W. at 194. The *Capps* court found that the articles, rather than merely narrating evidence at trial within view of the jury, effectively conveyed the public sentiment that the appellant was guilty. Our supreme court also found that the articles were improper influences whose effect upon the jury could not be ascertained and that there had been no attempt to show that the jury had not been influenced.

Here, after an hour-and-a-half of deliberations, the jury sent the trial judge a note stating that it had not reached a decision and asking to go home for the night. The jurors were returned to the courtroom, where they orally promised to follow the judge's admonishment not to (1) read anything in the morning paper, watch anything on television, or listen to anything on the radio concerning the case; (2) discuss the case with family; or (3) conduct any independent investigation into the case. When court reconvened the next morning, defense counsel asked the judge to poll the jurors to make sure they had not read an article in the local morning paper, headlined "Jury Deliberates Sex Case." The last

paragraph of the article reported that in a "previous sex-related conviction," Fields had pleaded no contest to first-degree sexual abuse, reduced from rape, and had received a five-year suspended sentence.

The prosecutor responded that the jury had been specifically instructed about not reading the morning paper and that there was no indication of any jurors reading anything. Defense counsel concurred that the court had properly instructed the jury but argued that a risk of prejudice existed if jurors had heard about the prior conviction. The judge noted that each juror had committed to follow instructions and that "[j]ust because there are articles in the paper, you have got nothing to present to the court that there has, in fact, been a violation of that directive from the court yesterday." The judge announced that he took the jurors at their word and would not poll them.

Fields argues that reversal was required because he pointed out a potentially prejudicial newspaper article, the pernicious language in the article, and the nature of prejudice that could be expected if the article had been read by or to any of the jurors. We find that these arguments alone did not meet the burden of showing that the jury was improperly influenced by the article during the time that they were apart. Here, as in *Harkness*, there was no showing of misconduct by the jury. Although polling the jury is a tool available to the trial judge, the judge in the present case was justified in assuming that jurors followed his admonition to refrain from reading the newspaper. Because no specific misconduct was shown, no prejudice resulted to the defendant.

Affirmed.

HART and GLOVER, JJ., agree.

Shana R. Woodard, for appellant.

Dustin McDaniel, Att'y Gen., by: *Rebecca B. Kane*, Ass't Att'y Gen., for appellee.