

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-992

Opinion Delivered March 10, 2010

SILAS NOBLE, JR.

APPELLANT

APPEAL FROM THE LAFAYETTE
COUNTY CIRCUIT COURT
[NO. CR-2008-93-1]

V.

HONORABLE JOE E. GRIFFIN
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found appellant, Silas Noble, Jr., guilty of delivery of cocaine. Following a lunch break, but prior to the jury hearing evidence on sentencing, a juror requested that she be allowed to revisit the evidence for the purpose of reexamining her vote. The circuit court denied the request, and the jury heard evidence on sentencing. When the jury deadlocked on sentencing and failed to return a sentence recommendation, the circuit court sentenced appellant to forty years' imprisonment. On appeal, appellant contends that the circuit court abused its discretion by denying his motion to set aside the verdict and reopen deliberations, and further, abused its discretion by denying his motion for a mistrial when the jury deadlocked on sentencing. We affirm.

At trial, the jury was asked to determine whether the State had established beyond a reasonable doubt that appellant was guilty of delivering cocaine. Following deliberations,

the jury returned a guilty verdict. The court asked the jury members if that was “the verdict of each juror,” and the court received an affirmative response. Both the State and appellant refused the court’s offer to poll the jury. The court then sent the jury to lunch.

Following the lunch recess, however, the jury foreperson announced in court and out of the presence of the other jurors that, while at lunch, she was “thinking about this” and “having a conflict on the decision I made because I don’t remember in the video and the pictures ever seeing the money exchanging hands from one party to another, which if it doesn’t then it’s not a distribution.” The foreperson asked whether there was “any way I can see the video again just to make certain that I didn’t hastily make a decision.” She explained that

[a]t that time I made it I think I was going on, because at first I didn’t come to that conclusion. At first when we went there I came to a different conclusion. I think everybody else came to that conclusion and I just was listening to what they said. . . . And I don’t know personally feel like I’m the only juror that has this question. . . . It’s just I think I’m the only one that, because everybody feels like the decision has been made and you can’t go backwards. . . . I just kind of felt like everybody else was saying one thing and what I was thinking wasn’t going to change their minds and I tried. And there was that possibility if you want to think that it could have happened. I never honestly, honestly I never sat there and analyzed did this happen or did this not happen. I just went on well it was this, the circumstances of the video were there, the pictures were there and went on that. And then when I was at lunch and eating I was sitting there going, analyzing this. I’m just an over thinker. As I was analyzing I’m going in that video did you actually see the money going from one to another.

The court inquired if she, the foreperson, felt “like that you can go forward with the remainder of the trial.” The foreperson stated that she did not “feel like I could sentence him to forty years to life.” The court advised the foreperson that he would instruct the jury

on the range of punishment, and stated that if she had “a question in your mind at the conclusion of that instruction as to whether or not you can follow that instruction based upon your considerations, if you will simply advise the Court, then we will make the appropriate decision at that time on the record.” The court also advised her that she could consider “all of the evidence” during the sentencing phase of the trial.

Counsel for appellant moved to “set aside the jury verdict” and asked that the “case be reopened for deliberation in that the jury was only out for approximately ten minutes and this juror is saying that she thinks that she may not have made the correct choice.” Counsel further noted that the juror felt “like that there may be other jurors that are feeling that same way right now, that the appropriate remedy [is] to set this jury aside and have them go back into deliberation on guilt or innocence.”

The court denied appellant’s motion. The jury then sat for evidence on the sentencing. Following deliberations, a juror announced that eleven of the twelve agreed on a sentence. When the court asked whether further discussion should occur, the juror stated, “I don’t think she is going to budge, Judge. She is set in her mind.” The court noted that the jury was deadlocked and stated that it was the court’s understanding that it was now the court’s duty to fix punishment. Counsel for appellant renewed appellant’s previous motions and further stated, “[A]nd now we amend and make another motion for a mistrial if this jury is now hung up on punishment as well given some of the issues we have already had.” The court denied the mistrial motion and sentenced appellant to forty years’ imprisonment.

Appellant first argues that the circuit court abused its discretion in denying his motion to set aside the verdict and reopen deliberations. Here, the jury foreperson sought to reexamine a video and photographs of the delivery of cocaine for the purpose of reexamining her vote. It is discretionary with the circuit court whether to permit a party to reopen a case either before or after the jury begins deliberating. *Sterling v. State*, 315 Ark. 598, 868 S.W.2d 490 (1994).

We hold that the circuit court did not abuse its discretion in denying appellant's motion to set aside the verdict and reopen the case for the foreperson to revisit the evidence admitted at trial and reexamine her vote. It would have been inappropriate for the circuit court to do so, because the juror's remarks to the court could not be considered by the court. Rule 606(b) of the Arkansas Rules of Evidence provides as follows:

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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions 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.

Thus, Rule 606(b) precludes a juror from testifying as to the effect of anything upon his mind as influencing him to assent to the verdict. *Veasey v. State*, 276 Ark. 457, 637 S.W.2d 545 (1982). Among other functions, Rule 606(b) protects the finality of judgments. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002). Here, the juror sought to reconsider

the verdict. Because the juror's statements to the court could not properly be considered in an inquiry into the validity of the jury's verdict, the court did not abuse its discretion in refusing to reopen the case to permit further deliberations.

Appellant further argues that the circuit court should have granted a mistrial because "one female juror would not agree on appellant's punishment" and that the circuit court's "failure to allow appellant to reopen jury deliberations severely prejudiced appellant in that it opened the door for the trial court to sentence appellant to the maximum punishment, short of life in prison." He suggests that when the jury foreperson expressed uncertainty about her verdict, the court should have discharged her from service.

It is not apparent from the record, however, that the juror who would not agree on punishment was the jury foreperson, so there are obvious problems with appellant's assertion that the sentencing by the court was the result of the court's failure to reopen jury deliberations. Moreover, a motion for mistrial must be raised at the first opportunity. *Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574 (2009). Had appellant wanted to remove the foreperson based on her assertion that she could not sentence appellant to forty years to life, then he should have requested the mistrial before, and not after, the jury deliberated on sentencing. Appellant apparently was content with having a juror on the jury who expressed reservations about sentencing appellant to forty years to life, and it was too late to seek a mistrial after implicitly assenting to the juror's presence.

Affirmed.

Cite as 2010 Ark. App. 228

GLADWIN and BROWN, JJ., agree.