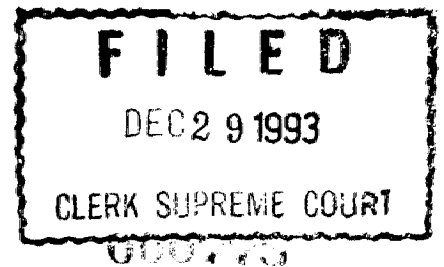


IN THE COURT OF APPEALS OF IOWA

No. 3-500 / 92-1025



STATE OF IOWA,

Appellee,

vs.

KENNETH E. FREEL,

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, L. D. Lybbert, Judge.

Kenneth Freel appeals his conviction, following a jury
trial, for two counts of murder in the first degree.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Shari
Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, and Thomas J. Ferguson, County
Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J. 000775

Defendant-appellant Kenneth Edward Freel was charged with first-degree murder after he confessed to causing the death of Ellen and Willie Beck. Defendant was tried to a jury and convicted of the charge. He appeals contending the trial court erred in instructing the jury and should not have denied his motion for change of venue. We affirm.

The Becks were found dead in their Waterloo, Iowa, home. Willie had been stabbed and Ellen had been stabbed, beaten and strangled. Defendant at trial testified he and a friend, Ken Griffin, had planned to burglarize the Beck house and, contrary to defendant's confession, Griffin had killed the Becks. There was evidence at trial showing defendant had items taken from the Beck house. There was no evidence of a forced entry into the Beck home.

Defendant at trial objected to parts of two instructions, specifically:

[Y]ou may, but are not required to, infer malice aforethought from the commission of Robbery or Burglary in the First Degree which results in death.

For example, the pushing open of an unlatched or partially-opened door to gain entry would be "breaking" within the meaning of the law.

The State contends the objections now made to these instructions were not raised in the trial court and we agree. Matters not raised in the trial court will not be considered on appeal. See Connor v. State, 362 N.W.2d 449, 457 (Iowa 1985); State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

Defendant's second contention is the trial court abused its discretion in refusing to grant his motion for change of venue.

The right to a fair trial by an impartial jury is a constitutional issue. See State v. Walters, 426 N.W.2d 136, 138 (Iowa 1988). Consequently, our review is de novo but reversal is warranted only where the trial court's decision demonstrates an abuse of discretion. See State v. Siemer, 454 N.W.2d 857, 860 (Iowa 1990).

A defendant relying on jury prejudice as a ground for reversal must show (1) publicity attending the trial that is so pervasive and inflammatory that prejudice must be presumed, or (2) actual prejudice on the part of the jury. Siemer, 454 N.W.2d at 860.

Iowa Rule of Criminal Procedure 10(10)(b) provides a trial court should grant a change of venue when evidence demonstrates a prejudice exists in the county where the trial is to be held and there is a substantial likelihood defendant cannot receive a fair and impartial trial from a jury selected from that county. See State v. Findling, 456 N.W.2d 3, 5 (Iowa App. 1990). To reverse a conviction on the trial court's failure to change venue, defendant must show actual prejudice of the jury or publicity about the case that is so pervasive and inflammatory we must presume prejudice. See State v. Harris, 436 N.W.2d 364, 367 (Iowa 1989); State v. Wilson, 406 N.W.2d 442, 445 (Iowa 1987); State v. Spargo, 364 N.W.2d 203, 207-08 (Iowa

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1985). To reverse the trial court, we need find an abuse of discretion. Findling, 456 N.W.2d at 5.

There were 110 prospective jurors. At the beginning of the jury selection process, the district court asked if any of the prospective jurors had any direct knowledge of the facts of the case or indirect knowledge of a substantial nature about the alleged facts in the case. Eighteen of prospective jurors were excused after acknowledging having either direct or indirect knowledge of the alleged facts of the case. Thirty-two prospective jurors were then selected, and voir dire began.

Defendant's counsel asked the prospective jurors whether they had any knowledge of the case, and thirty-one prospective jurors responded in the affirmative. However, at the end of voir dire, defendant's counsel asked if any of the prospective jurors had any reason why they could not be a fair and impartial juror in the case, and there were no affirmative responses.

We find no abuse of discretion in the district court refusal to change venue. See State v. Green, 457 N.W.2d 20, 23 (Iowa App. 1990); Findling, 456 N.W.2d at 5.

AFFIRMED.