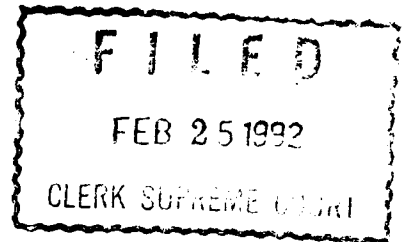


IN THE COURT OF APPEALS OF IOWA

No. 2-007 / 90-1605



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DANIEL MAURICE CLAYBON,

Defendant-Appellant.

677

Appeal from the Iowa District Court for Black Hawk County, Joseph C. Keefe, Judge.

Claybon appeals from his conviction, following a jury trial, for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Daniel Maurice Claybon appeals his conviction of murder in the first degree following a jury trial in Black Hawk County. He contends the trial court should have sustained a motion to move his trial from Black Hawk County and the trial court abused its discretion in admitting evidence of other criminal acts involving the defendant. We affirm.

Jeffery Wood and his fiance Andrea Hurley were walking in an area of west Waterloo when Hurley heard footsteps behind them. She looked back and saw two black males behind them. One of the men pushed Wood who turned and put his hands in the air. The two men came at Wood shoving him. A third person appeared on the scene. Hurley heard a pop, saw a spark and saw Wood grab his left side. She saw four or five people running. Wood turned, started to walk, fell, told her he had been shot and to call 911. Wood died. An autopsy showed he was shot through the heart.

The defendant and others were charged with murder. The defendant moved for a change of venue. He argued there had been inflammatory and pervasive publicity about the incident. He contended there was prejudice in the community against him which would prevent him from receiving a fair trial by an impartial jury in Black Hawk County. The trial court denied his motion for change of venue.

The defendant contends the trial court abused its discretion in refusing to grant the change. 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 hearing was held on the defendant's motion. At the hearing, two mock jury panels of fourteen jurors were questioned in a mock voir dire. Of the twenty-eight people, only three were not familiar with the case, the remainder had read about the case or heard about it on radio or television. Of the first fourteen interviewed, two indicated they could not be fair. Of the second fourteen, four felt because of the media coverage and the racial tensions in the Waterloo area, it would be difficult for the defendant to receive a fair trial in Waterloo.

The defendant also entered as exhibits voice and media coverage of the case. Several articles in the Waterloo Courier identified the defendant as the "trigger" man and quoted an assistant county attorney as saying a codefendant, Keith Walker, made statements the persons accused were gang members and that to be a gang member it was necessary to kill somebody.

The defendant's motion was denied.

Voir dire proceedings were reported. Of the initial thirty-two panel members, only two had no actual or media knowledge of the case. Those who had some knowledge of the case were questioned individually on voir dire. At the conclusion of the individual voir dire of those exposed to media coverage of the case, about sixty-two or sixty-six had some knowledge of the case, and the defendant's attorney renewed the motion for a change of venue. Fourteen of those jurors were excused because they had fixed opinions or could not be fair and impartial because of media coverage of the case.

Defendant's motion for change of venue was renewed when a juror who had been excused reported an alternate juror made comments while individual jurors were being questioned during voir dire that because everyone was bored they should play a game of hangman on the blackboard. The alternate juror then put the game on the blackboard and put the word "Negro" under the picture. The empaneled jurors were questioned. They did not specifically remember the event. The alternate juror was excused.

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 that there is a substantial likelihood the 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 the 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 (Iowa 1985). To reverse the trial court we need to find an abuse of discretion. Findling, 456 N.W.2d at 5.

The defendant contends the hangman incident and a rumor that made its way back to the trial judge show actual prejudice. The alternate juror who suggested the hangman game was removed before the trial began. None of the other jurors had a memory of the event that would illustrate any prejudice.

The defendant contends a rumor shows actual prejudice. The rumor went like this. The trial judge said another judge told him that another judge told him that his court reporter said she was at her hairdresser's the night before and her hairdresser said she had been doing the hair of a woman the last day or so who made the statement her husband was on the jury and came home and told her there was going to be a hanging. The trial judge talked to the court reporter who said what happened was that she and her hairdresser were at a shower and heard an unknown person

say somebody she worked with had made the statement at work that he or she was on the jury and there was going to be a hanging. The hairdresser was not able to identify either the person or the sex of the person who made the remarks.

The trial court reasoned a sitting juror would not have made the remark because he or she would have been at the trial and not at work. This rumor does not establish actual prejudice.

The defendant next contends prejudice can be presumed. There was substantial publicity following the shooting of Wood. There was publicity not only about the murder, but also publicity that referred to this murder that was directed to a general community concern about gang warfare. The victim was white and the defendant is black. The shooting occurred in a predominately white neighborhood in what was considered a fairly safe Waterloo neighborhood. It is an extremely close question. The trial court elected to resolve the issue by not moving the trial. We find no abuse of discretion in this decision. See Findling, 456 N.W.2d at 5; State v. Green, 457 N.W.2d 20, 23 (Iowa App. 1990).

The defendant's next assignment of error is that the trial court abused its discretion in admitting evidence about two assaults the defendant and other Black Gangster Disciples members participated in about a week before the murder. The evidence was the group traveled to the places

where the assaults occurred in the defendant's car. The defendant contends this evidence should not have been admitted.

Generally one crime cannot be proven by proof of another crime. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979).

Iowa R. Evid. 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of the rule is to exclude evidence that has no relevance except to show the defendant is a bad person. Cott, 283 N.W.2d 326.

For evidence to be admissible under an exception of rule 404(b), the challenged evidence must meet two tests. First, the evidence must be relevant to an issue other than defendant's propensity to commit a bad act and the evidence must go to establishing a material issue in the case. See State v. Roth, 403 N.W.2d 762, 765 (Iowa 1987); State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987); State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). Second, the evidence must have probative value that substantially outweighs any danger of (1) unfair prejudice, (2) confusion of the issues, or (3) misleading the jury. Iowa R. Evid. 403.

The trial court held the evidence was admissible to prove the intent of the parties to a conspiracy. The challenged evidence described incidents where the defendant drove his car with a group of Black Gangster Disciples from east Waterloo to west Waterloo and engaged in assaultive behavior. These incidents were similar to the events that led to Wood's death. The evidence therefore goes to the issue of the defendant's engaging in sprees of random violence with fellow gang members in west Waterloo. See State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981). Therefore, the first test for admissibility under an exception to Iowa R. Evid. 404(b) is met. The question of whether the prejudice outweighs the probative value is more difficult. Even relevant evidence can be excluded if its relevancy is outweighed by its prejudicial effect. See State v. Richardson, 400 N.W.2d 70, 73 (Iowa App. 1986). This evidence clearly went to show the defendant was a bad person and connected him with gang activities that had inflamed a community outcry. The evidence was very prejudicial. We do not, however, find under the facts of this case it justifies reversal. There is substantial evidence in the record without the challenged testimony to support a finding that the defendant was guilty of first degree murder and that the crime occurred while he was operating as a part of a gang. We affirm.

AFFIRMED.

Oxberger, C.J., specially concurs; Schlegel, J., dissents.

OXBERGER, C.J. (specially concurring)

I concur in the result only.

SCHLEGEL, J. (dissenting)

I respectfully dissent. The majority determines the trial court did not abuse its discretion in denying Claybon's request for change of venue or in admitting evidence of two prior assaults in which Claybon participated. I strongly disagree.

First, the trial court should have transferred venue to another county. To sustain a claim of presumptive prejudice, Claybon must prove the publicity attending his trial was pervasive and inflammatory. State v. Siemer, 454 N.W.2d 857, 860 (Iowa 1990). Whether publicity rises to the level of being presumptively prejudicial depends on "the nature, tone, and accuracy of the articles; their timing in relation to the trial; and the impact of the publicity on the jurors as revealed through voir dire." Id. (citing State v. Walters, 426 N.W.2d 136, 139 (Iowa 1988)). The media coverage in this case was definitely pervasive and prolonged.

Coverage in a Waterloo newspaper persisted for four months before the trial date. The case was sensationalized not only because it involved black teenagers allegedly killing a young white male in a predominately white neighborhood, but also because the media reports suggested the killing was gang-related. Almost all the potential jurors had more than minimal knowledge of this case; only two members of the first thirty-two-person panel had no

knowledge of this case. As the majority notes, a substantial number of prospective jurors held fixed opinions on the merits of the case such that they could not give the defendant a fair and impartial trial. I believe the voir dire proceedings indicate pervasive prejudice existed so as to poison the available pool of jurors. Based on the totality of circumstances, the trial court abused its discretion by refusing to grant Claybon's motions for change of venue.

Second, the evidence of other criminal acts involving the defendant was improperly admitted. The majority states the "evidence . . . goes to the issue of the defendant's engaging in sprees of random violence with fellow gang members in west Waterloo." I disagree. The assaults involved the defendant and five others beating up on people outside of bars; no weapon was present or used during these acts, and Claybon's role in the acts, other than his driving a car, is unclear.

There is no substantial evidence in the record to show a conspiracy existed on March 4, 1990, the date of the two assaults, or that the incidents were at all connected with the shooting of Jeff Wood on March 11. In addition, the assaults were sufficiently different from the Wood shooting such that it cannot be said the Wood shooting constituted another overt act in the furtherance of any alleged conspiracy. I believe the evidence does not establish an exception to Iowa Rule of Evidence 404(b); the evidence has

no relevance and should have been excluded from the jury's consideration.

I would reverse Claybon's conviction and remand this case for a new trial.