FILED
MAR 31 1980
SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
LARRY JOE CHRISTIANSEN,)
Defendant-Appellant.)

Filed March 31, 1980

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Appeal from Dallas District Court - Robert O. Frederick, Judge.

Defendant appeals conviction of operating a motor vehicle under the influence of an intoxicant, in violation of section 321.281, The Code 1975, contending he should have been granted a new trial because substantial irregularities occurred in the selection and empanelling of the jury. Affirmed.

James A. Norman of Frush, Reich & Norman, Adel, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and John C. Powell, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant, Larry Joe Christiansen, appeals conviction of operating a motor vehicle while under the influence of an intoxicant (OMVUI), in violation of section 321.281, The Code 1975. On appeal, defendant contends trial court erred in denying him a new trial because of substantial irregularities that occurred in the selection and empanelling of the jury, which were not discovered until after trial. We affirm.

I.

Pursuant to his arrest on April 24, 1977, defendant was charged by information, on May 6, 1977, with OMVUI. After jury trial, defendant was convicted on June 3, 1977, and he was sentenced on December 17, 1978, to pay a fine of $300, along with an indefinite suspension of his license. On June 27, 1977, defendant filed an application for additional time to file post-trial motions, stating he believed the selection of the jury in his trial did not comply with Chapter 609, The Code 1975. After additional time was granted, defendant filed on July 27, 1977, motions in arrest of judgment, for a new trial, and for a mistrial, alleging the verdict should be set aside and a new trial granted because the jury was incorrectly selected and empanelled. Trial court overruled the motions, finding defendant waived any error in the jury empanellment procedures by not objecting prior to trial as required by Iowa R. Civ. P. 187. While we hold trial court's finding of waiver is in error, under our review of the record we conclude the error is harmless and affirm the trial court's judgment. See State v. King, 256 N.W.2d 1, 12 (Iowa 1977); State v. Trudo, 253 N.W.2d 101, 107 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977).

II.

The trial court in finding defendant waived his objection to the empanelling of the jurors relied on Iowa R. Civ. P. 187. This rule and Chapter 609, The Code 1975, apply to jury panels in criminal trials. § 779.3, The Code 1975. In providing for challenging jury empanelling procedures, Iowa R. Civ. P. 187 allows either party to require the names of all jurors be called before drawing begins. Iowa R. Civ. P. 187(a). It further provides challenges to the panel must be in writing before any juror is sworn, specifying the grounds of statutory noncompliance. Iowa R. Civ. P. 187(d).

The trial court held defendant failed to proceed under Iowa R. Civ. P. 187(a) and (d) and waived his objection. This holding fails to recognize that waiver entails an intentional relinquishment of a known right. State v. Russell, 261 N.W.2d 490, 492 (Iowa 1978); State v. Niccum, 190 N.W.2d 815, 822 (Iowa 1971). Here, defendant was not aware of the defects in the jury empanelling, nor should he have reasonably been aware of them. Defendant can hardly be required to raise errors he is not aware of or challenge every jury without knowledge of some irregularity. See Sieren v. Hildreth, 254 Iowa 1010, 1012, 118 N.W.2d 575, 576 (1962). But see State v. Jones, 193 N.W.2d 509, 513 (Iowa 1972). While it may have been possible to discern certain problems from the circumstances of the trial, defendant was not reasonably aware of most of the defects he alleges and did not waive his objections to these. To hold otherwise would require every litigant to make a preliminary examination of the jury empanelling procedures in order to preserve error. The unreasonableness and inefficiency of such an approach is apparent; we find it unnecessary to give it any further consideration. The trial court's error, however, is harmless because we find defendant's substantive argument to be without merit. See State v. Houston, 261 Iowa 1369, 1376, 158 N.W.2d 158, 161 (1968); State v. Everett, 157 N.W.2d 144, 148 (Iowa 1968); State v. LaBarre, 210 N.W. 918, 919 (Iowa 1926). See also State v. Porter, 283 N.W.2d 351, 352-53 (Iowa 1979); State v. Smith, 282 N.W. 2d 138, 141 (Iowa 1979); State v. Davis, 259 N.W.2d 843, 845 (Iowa 1977); State v. Long, 231 Iowa 389, 394, 1 N.W.2d 102, 104 (1941).

III.

It is well established the statutes relating to the empanelling of juries are directory only; where there has been substantial compliance any irregularity in the drawing that does not prejudicially affect the defendant's right to a trial by a fair and impartial jury furnishes no ground for arresting judgment or awarding a new trial. State v. Lohr, 266 N.W.2d 1, 6 (Iowa 1978); State v. Williams, 264 N.W.2d 779, 782 (Iowa 1978); State v. Dohrn, 259 N.W.2d 801, 804 (Iowa 1977); State v. Williams, 243 N.W.2d 658, 661 (Iowa 1976); State v. Walker, 192 Iowa 823, 826-27, 185 N.W. 619, 621-22 (1921); State v. Wilson, 166 Iowa 304, 315-16, 144 N.W. 47, 49 (1913) (same standards applicable to both grand jurors and petit jurors, 166 Iowa at 315-16, 144 N.W. at 49); State v. Hassan, 149

Iowa 518, 525-26, 128 N.W. 960, 963-64 (1910); State v. Carney, 20 Iowa 82, 84-85 (1866); State v. Gillick, 7 Clark 287, 308 (Iowa 1858). Prejudice is not presumed when a departure from statutory procedure occurs; the burden to show prejudice rests with defendant. Dohrn, 259 N.W.2d at 804.

Defendant did not, however, prove or even allege how he was specifically prejudiced by the technical defects in the empanelling of the jury. Since defendant is entitled only to a fair and impartial jury, State v. Jones, 193 N.W.2d 508, 513 (Iowa 1972), he cannot complain when there is substantial compliance with the statute, unless actual prejudice is shown. Lohr, 266 N.W.2d at 6. There being no evidence of fraud, purposeful selection of certain jurors, or other unfair actions, we fail to find any proof of actual prejudice on the basis of the errors cited by defendant. See Gillick, 7 Clark at 308.

Our focus thus narrows to whether the jury empanelling procedures were in substantial compliance with Chapter 609, The Code 1975. The record substantiates the errors claimed by defendant and the State concedes they occurred. During the course of selection and empanelling of the jury, the following irregularities occurred:

1. Ballots used in selection of individual jury panel members were unfolded printed computer cards that exposed the jurors' names. § 609.15, The Code 1975.

2. Cards were filed in alphabetical order in an unsealed box. § 609.17, The Code 1975.

3. Ballots were drawn by thumbing through cards, rather than in accordance with the prescribed random procedure. § 609.24, The Code 1975.

4. Talesmen were selected in the same manner as used for drawing jury panel, neither of which complied with the statute. § 609.39, The Code 1975.

5. One talesman was selected from petit juror list. § 609.36, The Code 1975.

6. One talesman's name did not appear on any juror list. § 609.36, The Code 1975.

7. Prospective jurors were excused from jury duty by Clerk of Court on his motion, rather than by the court, as required by statute. § 607.3, The Code 1975.

While these acts did not technically comply with the statute, we find the procedure viewed as a whole was in substantial compliance. The juror commission had just recently switched to using computer cards with names of jurors on them for ballots and was attempting to work within the statute. The county recorder testified the county clerk of court thumbed through the cards, arranged alphabetically in a box, and would select apparently at random a card to draw. She testified that to her knowledge the clerk had never pulled a card and then put it back into the box. The deputy clerk of court testified she thought the cards were packed sufficiently to prevent the names from being read. She knew of no juror who was drawn and not put on the list, unless the juror was known to be deceased. These technical errors do not prevent a finding of substantial statutory compliance. See Jones, 193 N.W.2d at 513; State v. Rockwell, 82 Iowa 429, 431, 48 N.W. 721, 722 (1891); State v. Beckey, 79 Iowa 368, 370-74, 44 N.W. 679, 680-81 (1890); Gillick, 7 Clark at 308.

IV.

While we find the procedures used here were in substantial compliance with the statute and affirm the trial court's judgment, we do not condone or approve the technical defects in these procedures. Jury commissions should seek to ensure strict compliance with the statute in the selection and empanelling of juries. See Lohr, 266 N.W.2d at 6. We recommend the Dallas County Juror Commission institute changes to bring its juror selection procedures into compliance with the statute.

AFFIRMED.