FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	493
ELLSWORTH YOUNGBEAR,	)	5-499 84-1510
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Tama County - Harold J. Swailes, Judge.

Defendant appeals his conviction of OWI in violation of Iowa Code section 321.281 and two counts of manslaughter in violation of Iowa Code section 707.5(1). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Pamela Dahl, Assistant Attorney General; Brent Heeren, Tama County Attorney; and Richard R. Vander Mey, Assistant County Attorney; for plaintiff-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

Defendant appeals his conviction of OWI in violation of Iowa Code section 321.281 and two counts of manslaughter in violation of Iowa Code section 707.5(1). He asserts that: 1) he did not voluntarily consent to the blood test and inculpatory results should therefore have been suppressed; 2) venue should have been changed due to pretrial publicity; and 3) a mistrial should have been granted due to improper questioning by the prosecutor. We affirm.

Ellsworth Youngbear sustained serious to critical injuries and lost a large quantity of blood in a traffic accident in which two others persons were killed. At the hospital where he was transported for treatment, Youngbear was arrested for OWI and was read both Miranda warnings and implied consent procedures. On appeal, defendant argues that because of his physical condition he was unable to consent to a blood test at the time of arrest. Therefore, it is claimed that the results of the blood test should have been suppressed. We disagree.

Evidence indicates that defendant understood the implied consent procedure and gave his "unqualified, unequivocal assent." See State v. Richards, 229 N.W.2d 229, 234 (Iowa 1975). A nurse and a doctor both testified that when Youngbear arrived at the hospital he was oriented as to time, place, and person, and was responding normally to their questions and requests. The record reflects that the arresting officer read Youngbear the implied consent procedure twice, pausing to make sure he understood. The doctor, two nurses, and the arresting officer all testified that defendant gave an affirmative response to the request for a blood sample.

Based on these facts it is reasonable to conclude that consent for a blood test was given. Contrary to defendant's assertion, the seriousness of his physical injuries is of little consequence as long as he gave his unqualified consent.

Accordingly, we conclude that the results of the blood test were properly admitted.

Youngbear also argues that the trial court erred in denying his motion for a change of venue. He claims that due to unfavorable pretrial publicity, he was unable to receive a fair trial.

In considering this allegation, we review the record de novo and determine whether there is an abuse of discretion. State v. Hickman, 337 N.W.2d 512, 514 (Iowa 1983). Pursuant to Iowa Rules of Criminal Procedure 10(9)(b), a change of venue must be granted when the court is satisfied that such prejudice exists in the county of the scheduled trial that there is a "substantial likelihood a fair and impartial trial cannot be had there."

In the present case, defendant's primary complaint is the "inaccurate and misleading nature" of the publicity concerning his prior convictions. Two articles referred to Youngbear's conviction for second degree murder which was overturned in 1976. Yet, neither article mentioned the fact that defendant was subsequently retried and convicted of manslaughter. It is claimed that this "inaccuracy" was sufficiently prejudicial to require a change of venue.

Our review of the record, however, leads us to a contrary conclusion. While the reports of Youngbear's prior convictions may have been incomplete, it is significant that they were made approximately four months before the trial. It has been held in past cases that a similar time length "was sufficient to dissipate any prejudicial effect that may have been created by adverse publicity." Johnson, 318 N.W.2d at 423, and authorities listed therein. It is also apparent from the record that precautions were taken to ensure defendant received an impartial jury panel. Prospective jurors who had been exposed to pretrial publicity were divided into small groups and questioned individually concerning possible prejudice.

In light of the length of time between the publicity and the trial, as well as the extensive voir dire, we conclude that there was no abuse of discretion. Failure to change venue did not result in an unfair trial.

Youngbear's final claim is that he is entitled to a new trial based on prosecutorial misconduct. During the State's redirect examination of an expert witness, the following colloquy took place:

> Q. The criminalistics laboratory retains these blood samples at the request of the county attorney's is that correct?
>
> MR. WILSON: Your Honor, I'm going to object. I don't see what the relevance is, who requested these things be retained. They were retained and that's the evidence.
>
> THE COURT: Objection sustained.
>
> Q. (By Mr. Vander Mey) Well, let me ask you, Mr. Rayburn, were the blood samples — the two blood samples vials contained in State's Exhibit No. 13 equally available to defense counsel for testing?
>
> MR. WILSON: Object to that, Your Honor. What relevance does this have? This is not relevant.
>
> THE COURT: Sustained.
>
> Q. (By Mr. Vander Mey) Has any defendant in a criminal case requested that you make the blood samples available to them for independent chemical testing and analysis?
>
> MR. WILSON: Your Honor, I'm going to enter the same objection, that counsel is asking the same precise question; it is not relevant or material to any issue in this case, it's prosecutor misconduct, and I'm going to move the Court for a mistrial.

The motion for mistrial was overruled.

Youngbear claims on appeal that the prosecutor's questions had the effect of shifting the burden of proof to the defendant and he is entitled to a new trial. We do not agree.

Prosecutorial misconduct entitles a defendant to a new trial only when it appears to have been so prejudicial that it deprives the defendant of a fair

trial. State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). In the present case, this standard has not been met. The questions concerning the defendant's failure to request independent tests were objected to before they were answered. Thus, the jury was not exposed to any improper material and the possibility of prejudice was minimized. In such a situation, trial court did not abuse its discretion in failing to declare a mistrial.

We conclude that Youngbear received a fair trial and affirm the trial court.

AFFIRMED.