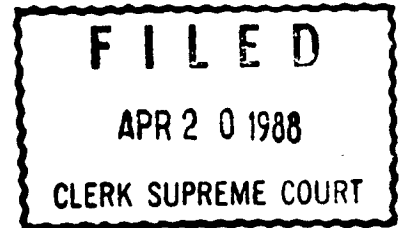


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JAMES J. JEFFRIES,)

Defendant-Appellant.)

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Filed April 20, 1988

7-527
86-917

Appeal from the Iowa District Court for Lee County (No. CR 1285(N)0186),
D. B. Hendrickson and William S. Cahill, Judges.

Defendant appeals from his convictions, following a jury trial, for seven counts of second-degree kidnapping, one count of insurrection, and one count of assault while participating in a felony. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Barry M. Anderson, Keokuk, for defendant-appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden and Thomas H. Miller, Assistant Attorneys General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Following a jury trial, James Jeffries was convicted of seven counts of second-degree kidnapping, Iowa Code §§ 710.1, .3 (1985), one count of insurrection, Iowa Code § 718.1 (1985), and one count of assault while participating in a felony, Iowa Code §§ 708.1, .3 (1985). Jeffries has now appealed the judgment imposing sentences, and we affirm in part, reverse in part, and remand.

Jeffries is a prison inmate at Fort Madison accused of participating in a prison riot. He, along with several codefendants, was tried and convicted. Three of these convictions have been affirmed on appeal. See State v. Cameron, 412 N.W.2d 916 (Iowa 1987); State v. Wagner, 410 N.W.2d 207 (Iowa 1987); State v. Misner, 410 N.W.2d 216 (Iowa 1987). The general facts surrounding the uprising are set forth in Misner, and we will only focus on the facts as they relate to defendant Jeffries.

Jeffries raises the five issues discussed in the following divisions.

I. Jeffries asserts the trial court erred in several rulings relating to the jury. His claims involve the trial court's refusal to grant a change of venue and its denial of various juror-related mistrial motions.

Addressing the change of venue issue, we note initially that while our review of this constitutionally-based claim is de novo, reversal is required only when the trial court has abused its discretion in denying the motion. State v. Spargo, 364 N.W.2d 203, 207 (Iowa 1985). The trial court must determine whether "such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county." Iowa R. Crim. P. 10(10)(b). Specifically, Jeffries "'must show either actual prejudice on the part of the jury or must show that the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed.'" State v. Wilson, 406 N.W.2d

442, 445 (Iowa 1987) (quoting Spargo, 364 N.W.2d at 207); State v. Robinson, 389 N.W.2d 401, 403 (Iowa 1986); State v. Gavin, 360 N.W.2d 817, 819 (Iowa 1985).

Jeffries has produced a number of articles in support of his argument. A review of these articles shows they are on the whole objective, factual reports expressing no view on his innocence or guilt. Jeffries has not pointed to anything in the reports that is misleading or obviously intended to inflame the public against him. Exposure to newsworthy events will not alone give rise to a presumption of prejudice. Misner, 410 N.W.2d at 219.

Additionally, the news reports in question were confined to a short period following the uprising. The trial was not held until more than four months later. Jeffries has not shown the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed. We hold the trial court did not abuse its discretion in denying the change of venue motion.

Jeffries' contentions of jury misconduct must also fail. He asserts the jury was prejudiced because one juror was married to a prison employee and that a juror read newspaper articles and discussed the matter during the trial.

Questions of jury prejudice require the trial court to exercise sound discretion based upon the facts and circumstances then presented. See State v. Webb, 309 N.W.2d 404, 414 (Iowa 1981); State v. Staker, 220 N.W.2d 613, 616-17 (Iowa 1974). A party claiming the trial court abused its discretion is obligated "to provide this court with a record affirmatively disclosing the error relied upon." State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983) (quoting State v. Ludwig, 305 N.W.2d 511, 513 (Iowa 1981)).

The voir dire in this case was unreported, so we have no basis to evaluate Jeffries' general claims of prejudice that are based on the jury selection process. We hold this issue waived. Christianson, 337 N.W.2d at 504.

We also reject Jeffries' claim that a specific juror was prejudiced. This juror was not specifically asked about her relationship with a prison employee, although she raised the relationship on her juror questionnaire. She also revealed the fact to the court and was examined again by both the defense and prosecution. She explained her husband was on vacation during the uprising, that she only knew one of the over thirty witnesses who were going to testify, and that she would be able to render an impartial verdict in the case. Following examination, Jeffries made no objection to her continued service on the jury.

Jeffries subsequently challenged her presence through a motion for mistrial and was overruled. He has, however, not shown an abuse of discretion by the trial court. He points to nothing showing prejudice or that the juror was anything but fair and impartial.

Jeffries also raises a claim of juror misconduct. He asserts a juror read newspaper accounts during the trial and discussed them with other jurors. This conduct violated the court's admonition.

Assuming the misconduct occurred, we find, however, that Jeffries has not shown the misconduct was calculated or did in fact influence the jury's verdict. See State v. Sauls, 391 N.W.2d 239, 241 (Iowa 1986); State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984). Jeffries' motion for a mistrial was properly denied.

II. Jeffries asserts the trial court erred in denying his motion for a continuance and motion for severance. He claims the case was complex and he was prejudiced by being tried with two of the riot's instigators.

A trial court is vested with broad discretion in ruling a motion to continue. State v. Grimme, 338 N.W.2d 142, 144 (Iowa 1985). To demonstrate an abuse of discretion, Jeffries must show the discretion was exercised on grounds or

for reasons clearly untenable or to an extent clearly unreasonable. State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

Jeffries was arraigned on February 4, 1986, at which time he requested a speedy trial. The court scheduled trial and made clear that discovery deadlines would be strictly enforced. Jeffries then filed a motion to continue, asking for a stay of proceedings while he applied for discretionary review of the denial of the change of venue motion. The trial court denied the motion, finding its earlier motion to be correct; the supreme court subsequently denied the application.

Jeffries has not shown an abuse of discretion by the trial court. Jeffries has not shown good and compelling cause requiring the granting of a continuance. See Iowa R. Crim. P. 81(1). His actions were calculated to slow down the progression of the case. He also has not shown any prejudice resulting from the denial of the continuance.

We now examine Jeffries' motion to sever. Jeffries sought to sever his case from his two codefendants because he would be prejudiced by their conduct during the uprising.

Jeffries did not make his motion until sixty-six days after his arraignment. This motion was untimely. Iowa R. Crim. P. 10(2)(e) and 10(4). Jeffries did not make an attempt to show good cause for his failure to file within the time limit. Thus, Jeffries' right to file a motion to sever was waived. Iowa R. Crim. P. 10(3).

Additionally, we find that Jeffries requested to be tried with the other eight codefendants. If he was concerned with the complexity of the issues and factual distinctions to be made, these concerns should have been apparent when all eight codefendants were scheduled to go to trial. We find no abuse of discretion in the court's denial of the motion for severance.

III. Jeffries next asserts the trial court erred in overruling his motion for acquittal on the kidnapping charges. He contends the evidence is insufficient to support the charge, particularly on the confinement and removal elements. He claims he was not an instigator, that he merely stood guard over the guards, and false imprisonment was the only charge supported by the facts.

The elements necessary to establish kidnapping in the second degree are contained in Iowa Code sections 710.1 and 710.3. Section 710.1 provides:

A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:

1. The intent to hold such person for ransom.
2. The intent to use such a person as a shield or hostage.
3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.
4. The intent to secretly confine such a person.
5. The intent to interfere with the performance of any government function.

Iowa Code § 710.1 (1985). Second-degree kidnapping is committed when a defendant kidnaps any individual as that term is defined in section 710.1 while armed with a dangerous weapon. Id. § 710.3.

We view the evidence in the light most favorable to the State, and all reasonable inferences tending to support the conviction are accepted as established. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). We hold the evidence sufficient to support the kidnapping charge.

Jeffries attempts to de-emphasize his role in the uprising. When Jeffries was let out of his cell by an inmate, he was carrying a sharpened toilet brush. Misner handed him a steel shank and put him in charge of guarding Officer Teel.

Jeffries made Teel kneel, facing the door. After a commotion, Jeffries removed Teel to the first floor office.

Once the other guards returned to the first floor, the inmates decided to take the guards to the third floor. Jeffries soon joined the guards upstairs and participated in the discussion of what demands to make in exchange for the hostages. There is no question Jeffries helped in removing and guarding the hostages. There was also direct evidence that Jeffries was acting in concert with inmates Misner, Cameron, and Vance. We conclude this evidence sufficient to support the kidnapping charge.

Jeffries is also apparently claiming his motion should have been sustained since there was no removal or confinement of the guards and their confinement was merely incidental to the insurrection and assault. He relies on State v. Rich, 305 N.W.2d 739 (Iowa 1981).

The supreme court rejected a similar challenge in State v. Misner, 410 N.W.2d 216 (Iowa 1987), by holding that the Rich principles only prevent kidnapping charges from being prosecuted in cases where the confinement or removal have no independent significance. Id. at 223. In cases where the kidnapping is the central crime, the "merely incidental" rule has no role. Id. The court then rejected Misner's argument because it found kidnapping was the central purpose of the uprising.

We agree that kidnapping was the central purpose of the uprising. Jeffries' actions support this view. He aided in restraining the guards at various locations in the cell house. He told the guards if they did as they were told, they would not be hurt; he participated in discussions regarding what demands to make in exchange for the hostages. We therefore hold the trial court was correct in overruling his motions for acquittal and dismissal.

IV. Jeffries also contends there was insufficient evidence to support the insurrection charge, that the statute is unconstitutional, and that the court should have instructed on the lesser-included offenses of willful disturbance or harassment of public officers or employees.

We reject Jeffries' constitutional attack on the statute. The supreme court upheld the statute's constitutionality in State v. Wagner, 410 N.W.2d 207, 214-15 (Iowa 1987).

Pursuant to Iowa Rule of Criminal Procedure 6(3), the trial court must instruct the jury on the charged offense and all lesser-included offenses. Rule 21(3) provides that "[i]n all cases, the defendant may be found guilty of any offense the commission of which is necessarily included in that with which the defendant is charged." A defendant may be convicted only of the highest offense which the jury finds established. See Iowa Code § 701.9 (1983); Iowa R. Crim. P. 6(2). The supreme court has prescribed a two-part test to determine whether a lesser offense falls under a charged offense:

The legal or element test requires the lesser offense to be composed solely of some but not all of the elements of the greater offenses. Thus the lesser offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the lesser. Conversely, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.

The factual test requires the court to determine whether there is a sufficient factual basis in the record for submitting the included offense.

State v. Lampman, 345 N.W.2d 142, 143 (Iowa 1984) (citations omitted); see also State v. Mateer, 383 N.W.2d 533, 536 (Iowa 1986). Both tests must be satisfied before the defendant is entitled to an instruction on each lesser-included offense. Mateer, 383 N.W.2d at 536.

The offense of insurrection is defined in Iowa Code section 718.1. That section provides:

An insurrection is three or more persons acting in concert and using physical violence against persons or property, with the purpose of interfering with, disrupting, or destroying the government of the state, or any subdivision thereof, or to prevent any executive, legislative, or judicial officer or body from performing its lawful function. Participation in insurrection is a class "C" felony.

This section replaces Iowa's treason statute and combines the two former crimes of Inciting Insurrection and Inciting Hostilities. See Iowa Code §§ 689.4 and 689.8 (1977) (repealed 1978). It has been broadened to include interference with or disruption of any subdivision of government. See Dunahoo, The New Iowa Criminal Code: Part II, 29 Drake L. Rev. 491, 589-90 (1980).

Willful disturbance is defined in Iowa Code section 718.3, which provides:

Any person who willfully disturbs any deliberative body or agency of the state, or subdivision thereof, with the purpose of disrupting the functioning of such body or agency by tumultuous behavior, or coercing by force or the threat of force any official conduct or proceeding, commits a serious misdemeanor.

This is a new crime created to cover intentional disturbances with deliberative bodies or agencies. See Dunahoo, 29 Drake L. Rev. at 591. Unlike insurrection, it does not require multiple defendants or physical violence.

Harassment of public officers and employees is defined in Iowa Code section 718.4, which provides:

Any person who willfully prevents or attempts to prevent any public officer or employee from performing the officer's or employee's duty commits a simple misdemeanor.

This is also a new crime designed to address interference with public officers or employees. See Dunahoo, 29 Drake L. Rev. at 592.

We conclude the trial court erred in not giving the requested instructions. These offenses are composed solely of the elements included in the insurrection statute. By committing insurrection, a defendant also commits the offenses of willful disturbance and harassment of public officers and employees. The legal test is therefore met.

There is sufficient evidence in the record to support each element of the lesser-included offenses. Jeffries was participating in a prison riot. There was direct evidence he was acting in concert with Misner, Cameron, and Vance. He assaulted Officers Teel and Hodgerson; he also beat three other inmates. There is also evidence the guards were taken as hostages to be used as bargaining chips to satisfy inmate demands. Additionally, the Department of Corrections is an agency, see 291 Iowa Admin. Code Ch. 1, and the Iowa State Penitentiary at Fort Madison is a subdivision of the Department, see 291 Iowa Admin. Code § 1.6(1)(a). Thus, the factual test is met.

Because the trial court failed to give these instructions, Jeffries is entitled to a new trial on the insurrection charge. We therefore reverse Jeffries' insurrection conviction and remand for a new trial on that issue only.

V. We now address Jeffries' final contention. He contends his motion for mistrial should have been sustained when the original trial judge was unable to continue and a new judge was brought in.

After eleven state witnesses had been called, the presiding judge, the Honorable William S. Cahill, became ill and was unable to continue. He subsequently was hospitalized. The Honorable David B. Hendrickson replaced Judge Cahill and completed the trial, entered judgment, and imposed sentences.

When the substitution occurred, Jeffries moved for a mistrial, which Judge Hendrickson overruled.

Substitution of trial judges is authorized by Iowa Rule of Criminal Procedure 18(7)(b)(1). This rule provides:

If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he or she has familiarized himself or herself with the record of the trial, may proceed with and finish the trial.

Iowa R. Crim. P. 18(7)(b)(1). Iowa's rule mirrors Federal Rule of Criminal Procedure 25(a) and thus federal interpretations of that rule are relevant.

Because the potential for disruption and confusion is inherent in all cases in which substitution of judges is contemplated, substantial caution must be exercised in order to insure a defendant's right to a fair trial is fully protected. Although the decision whether to substitute trial judges is committed to the sound discretion of trial court, substitution should be denied and trial delayed or mistrial granted if it reasonably is shown substitution will substantially prejudice defendant's right to a fair trial. See State v. Sereg, 229 Iowa 1105, 1120-21, 296 N.W. 231, 238 (1941); see also United States v. Lane, 708 F.2d 1394, 1396-97 (9th Cir. 1983); United States v. Santos, 588 F.2d 1300, 1303-04 (9th Cir.), cert. denied, 441 U.S. 906, 99 S. Ct. 1994, 60 L. Ed. 2d 374 (1979); United States v. Boswell, 565 F.2d 1338, 1341-42 (5th Cir.), cert. denied, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 110 (1978) (each holding the failure to comply fully with rule 25(a) was not grounds for reversal in the absence of a showing of prejudice).

A review of the record shows that Jeffries was not prejudiced by the substitution of judges. It is clear that a substitution of judges was necessary because Judge Cahill was unable to proceed due to illness. The record reveals that Judge Hendrickson complied fully with rule 18(7)(b)(1). Judge Hendrickson disclosed to the defendants that he had thoroughly familiarized himself with all the evidence in the case. He was aware of the factual distinctions to be made between Jeffries' actions and the other defendants' when he ruled on Jeffries' motion. Jeffries has not demonstrated any prejudice through the substitution.

In summary, we affirm the trial court on the denial of the motion to change venue, the denial of the motions to continue and to sever, the denial of the motions for mistrial based on juror prejudice and misconduct, the denial of the motions for dismissal and acquittal on the kidnapping charges, and the denial of the motion for mistrial based on the substitution of judges. We do, however,

reverse the defendant's conviction for insurrection and remand for a new trial on that issue only.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.