

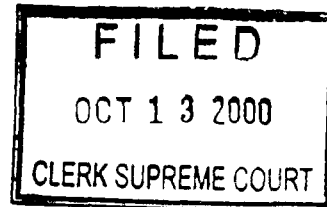
IN THE COURT OF APPEALS OF IOWA

No. 0-492 / 99-1613
Filed October 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMEY LEE MILLS,
Defendant-Appellant.



Appeal from the Iowa District Court for Clinton County, C.H. Pelton,
Judge.

On appeal following his convictions for first-degree murder and first-degree robbery, the defendant contends the trial court abused its discretion in denying his motion for change of venue. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Mike E. Wolf, County Attorney, and Gary Strausser, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Defendant Jamey Lee Mills appeals judgments and sentences for first-degree murder and robbery in the first degree. He contends the trial court abused its discretion in denying his motion for a change of venue, in violation of his constitutional right to a fair trial by impartial jurors. We affirm.

Background Facts and Prior Proceedings

Mills and his girlfriend, Lisa Heavilin, were charged with the November 24, 1998 murder and robbery of Leila Heavilin, who was Lisa's grandmother. The charges against Mills were severed from those against Lisa, and went to trial first.

On the morning of November 25, 1998 Betty Schroeder attempted to call Leila Heavilin in order to coordinate their usual Wednesday outing of gambling at the Mississippi Belle II followed perhaps by lunch and a game of Yahtzee. When Ms. Schroeder could not reach Ms. Heavilin by phone she called Ms. Heavilin's daughter, Myrna Kruse. The two women, along with Homer Schroeder, then went to Ms. Heavilin's home to check on her. They arrived at approximately 9:20 a.m. to discover the doors of Ms. Heavilin's home were unlocked. Upon entering the home Ms. Kruse saw her mother lying on the floor and she immediately contacted the police. Ms. Heavilin was dead. She had been bludgeoned, strangled and stabbed.

The evidence at trial showed that Mills and Lisa had met in the summer of 1998 and began living together shortly thereafter. It showed that in the day or two before November 24 they had discussed robbing and killing Ms. Heavilin, discussions initiated by Lisa.

Mills testified at trial that he had spent the day of the murder ingesting motion sickness pills, smoking crack, drinking alcohol and "doing Duster." Mills told the police that at some point Lisa said, "Let's go kill my grandma," and he said, "Okay." Later that night they went to Ms. Heavilin's home. Although Mills testified at trial that he had no memory of the murder, he had told police prior to trial that he "thumped" Ms. Heavilin on the head with a table leg the couple had acquired. Mills also had stated to police that he put his arm around Ms. Heavilin's neck to choke her and then used a fillet knife to cut her throat. Mills and Lisa had then rummaged through Ms. Heavilin's belongings, taking her wallet, checkbook, coin purse, and some jewelry.

The weekend before the trial two newspaper accounts were published in area newspapers regarding the upcoming trial. One was in the *Quad City Times* on Friday August 27, 1999, the other was in the *Clinton Herald* on Saturday August 28, 1999. On August 27 Mills moved for a change of venue based on the August 27 article. At hearing on the motion, held on the morning trial began, Mills expanded the motion to include the August 28 article. The trial court denied the motion, finding there was no substantial likelihood that the defendant could not get a fair trial. The court stated, "There's no evidence of actual prejudice. It is really not inflammatory publicity, and I think there's nothing in the articles that won't come into evidence - in fact, probably won't come in, in opening remarks."

Extensive voir dire was conducted, with any potential jurors who were exposed to information regarding the case questioned individually. The trial court sustained several challenges for cause. A jury was selected and the trial commenced, with Mills being found guilty on both counts on September 8, 1999.

Mills moved for a new trial and in arrest of judgment on September 23, arguing that the pretrial publicity had denied him his right to a fair and impartial trial. The trial court denied the motion and sentenced Mills to a term of imprisonment for life for first degree murder and for a term of twenty-five years for first degree robbery, with the sentences to run concurrently. Mills timely filed notice of appeal.

Scope and Standard of Review

Mills asserts the denial of his change of venue motion denied him his right to a fair trial as guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 10 of the Iowa Constitution. Our scope of review of the trial court's ruling is *de novo* and our standard of review is to determine whether the trial court abused its discretion in denying the motion. *State v. Veal*, 564 N.W.2d 797, 803, 806 (Iowa 1997); *State v. Robinson*, 389 N.W.2d 401, 403 (Iowa 1986). Error was preserved by Mills' motion for change of venue and the trial court's ruling denying the motion.

Merits

Iowa Rule of Criminal Procedure 10(10)(b) provides that the trial court should change venue if it is satisfied that "such a 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."

[A] defendant who seeks reversal of a conviction on the basis of denial of his motion for change of venue 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. Spargo, 364 N.W.2d 203, 207 (Iowa 1985); *see also Veal*, 564 N.W.2d at 806. *Mills* does not claim that there was actual prejudice. He contends the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed. His claim is based on two newspaper articles, one published on Friday and one on Saturday, before his trial started on the following Monday.

"Mere exposure to news accounts does not amount to a substantial likelihood of prejudice." *State v. Walters*, 426 N.W.2d 136, 138 (Iowa 1988); *see also State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989). Juror impartiality does not demand complete juror ignorance of issues and events. *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1988).

For the purpose of determining juror prejudice, the relevant question is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.

Id.

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Walters, 426 N.W.2d at 139 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 756 (1961)).

In order to determine whether the publicity in this case was so pervasive and inflammatory that jury prejudice must be presumed the court must examine several factors. *Walters*, 426 N.W.2d at 139. Among the factors considered are: whether the publicity indicates the defendant is guilty of the charges against him; whether the accounts are factual and informative in tone and whether enough

time that has passed between publication of the material and the trial so as to dissipate any prejudicial effect; whether pretrial publicity was inflammatory in tone; whether there were any editorial denunciations of the defendant or emotional stories regarding the defendant or victim; whether pretrial coverage was inaccurate, misleading or unfair; whether panel members who profess any knowledge of the case stated they could nevertheless render an impartial verdict on the basis of evidence presented at trial and without reference to the prior knowledge; and finally, whether the trial court sustained motions for cause against jurors who had prior knowledge of the case and stated they would not be able to render an impartial verdict. *Id.*

Mills' first contention is that the August 27, 1999 article was written in a sympathetic tone toward the victim, her family and friends, endearing the reader to them by including several quotes from Betty Schroeder, who was the victim's long-time friend and one of the people who found the body. Second, Mills claims that because both articles disclosed that the victim was the grandmother of Mills' girlfriend, they would have an inflammatory effect on potential jurors. Third, Mills contends that each article prejudiced his ability to have a fair and impartial trial by referring to a "trail of evidence" to him and Lisa Heavilin. Next, Mills argues that the photograph of him in his jail jumpsuit which was published with the August 28, 1999 article prejudiced him by impairing the jurors ability to presume he was innocent. Finally, Mills asserts that the short time period (only two and three days) between when the articles were published and the start of the trial is significant as there was no passage of time to dissipate any prejudicial effect of the articles.

It cannot be denied that these articles were somewhat sensational, and that the article in the *Quad City Times* on August 27, 1999 might evoke emotional response regarding the victim. However, it also cannot be denied that the nature of the crime itself as well as the facts surrounding it were also somewhat sensational. The record here merely shows the "routine reporting of a sensational crime," not a "sensational reporting of a routine crime" as Mills' attempts to argue. See *State v. Siemer*, 454 N.W.2d 857, 861 (1990); *Walters*, 426 N.W.2d at 139; see also *State v. Morgan*, 559 N.W.2d 603, 611 (Iowa 1997) (noting that although child victim's murder "had captivated the public," this "was due to the sordid nature of the crime, not morbid or sensationalistic treatment by the media"). While the quotes from Ms. Schroeder concerning the victim and Ms. Schroeder's relationship with her might evoke an emotional response from some, nothing in the article indicates that the remarks were themselves emotionally made. Further, considering the nature of the crime there was nothing inflammatory about the remarks.

Neither of the articles indicated that Mills was guilty of the crimes charged. The nature and tone of the articles, especially the August 28 article, was predominantly factual and consisted largely of facts which were either already known or would be revealed and undisputed at trial. The articles' reference to the victim as Mills' girlfriend's grandmother did not give any false, misleading or inflammatory information to the jurors. The fact is Ms. Heavilin was Lisa Heavilin's grandmother, which of course only increased the somewhat sensational and emotional nature of the crime itself. This mere recitation of a fact which was not only true but also would be in evidence at trial did not create a

substantial likelihood of prejudicing potential jurors. There is no evidence in the record to indicate the articles were inaccurate in any way, nor did they contain any editorial denunciations of Mills.

The August 28 article was accompanied by a photograph of Mills. It shows him from upper abdomen up, wearing what apparently appeared in the newspaper to be an orange shirt and which was in fact jail-issued clothing. In some instances the way a defendant appears to the jury can violate the defendant's due process rights by denying him or her the indicia of innocence they are entitled to in the presence of the jury. *See State v. Johnson*, 534 N.W.2d 118, 126 (Iowa App. 1995) (noting that requiring defendant to appear before the jury in prison clothing creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations) (citing *Estelle v. Williams*, 425 U.S. 501, 512, 96 S. Ct. 1691, 1697, 48 L. Ed. 2d 126, 135 (1976)). *See also State v. Wilson*, 406 N.W.2d 442, 449 (Iowa 1987) (stating that a defendant is usually not restrained in the courtroom in front of the jury in order to prevent creation of prejudice in the minds of jurors).

In the cases cited above, however, the concern regarding prejudice came about from having the defendant in the presence of the jury for an extended period of time in either prison attire or shackles. Both the Iowa Supreme Court and the U.S. Supreme Court have distinguished between this type of continual and unavoidable reminder of the accused's condition, and a brief, inadvertent observation of the accused in prison attire, as in this case, or in shackles. *See Wilson*, 406 N.W.2d at 448 (stating there are two distinct factual categories of physical indicia of innocence as it pertains to physical restraints during criminal

trial process, and if a juror briefly observes defendant being moved in shackles it is defendant's burden to show how this prejudicially affected the jury; it is not inherently prejudicial as it is when defendant is shackled in the courtroom throughout trial); and *Estelle*, 425 U.S. at 504, 96 S. Ct. at 1693, 48 L. Ed. 2d at 130-31 (noting that courts have generally determined that an accused should not be compelled to go to trial in prison or jail clothing in recognition that this "constant reminder of the accused's condition" may affect a juror's judgment as clothing is likely to be "a continuing influence throughout the trial"). Additionally, the U.S. Supreme Court in *Estelle* quoted with approval from a U.S. Court of Appeals opinion that, "No prejudice can result from seeing that which is already known." *Id.* at 507, 96 S. Ct. at 1694, 48 L. Ed. 2d at 132. As argued by the State, if Mills' clothing was in fact recognizable as jail attire, most readers of the article would in all likelihood not be surprised that Mills was in jail while awaiting trial for first-degree murder. Therefore, we believe that seeing Mills once in a photograph in the newspaper in jail attire when it could reasonably be expected he would be in jail pending trial because of the nature of the charge would not impair the jurors' ability to decide the case impartially on the basis of the evidence presented at trial.

The voir dire examination of the jury panel is perhaps the best indicator of the degree of pervasiveness in news coverage prior to trial. *State v. Atwood*, 602 N.W.2d 775, 781 (Iowa 1999). "Voir dire of prospective jurors should be trusted to expose any substantial prejudices among them." *Walters*, 426 N.W.2d at 138. "[T]o the extent particular jurors may be substantially prejudiced against a

defendant, rigorous voir dire can be trusted to expose these prejudices.” *State v. Wagner*, 410 N.W.2d 207, 211 (Iowa 1987).

The record shows that detailed, cautious voir dire was conducted. Jury selection began with a panel of seventy-five potential jurors. Thirty-two names were drawn from which to select a jury of twelve persons and four names were drawn from which to select two alternates. The court and counsel apparently conducted general questioning of the prospective jurors in the courtroom. As a result of that questioning they identified twenty-four prospective jurors and alternates to be questioned individually outside the presence of the others for various reasons, including but not limited to exposure to pretrial publicity.

During individual questioning of prospective jurors and alternates, one prospective alternate was excused by agreement of the court and parties, without being individually questioned, because the court and parties agreed that the prospective alternate could not comprehend the proceedings. The remaining twenty-three prospective jurors and alternates were questioned individually.

Of the twenty-three prospective jurors who were questioned individually, nineteen had been exposed to media publicity regarding the case. The record shows that nine had been exposed to media reports that included one or more of the two recent newspaper articles; two had been exposed to a newspaper article at the time of the events giving rise to the charges, but had apparently not been exposed to the recent newspaper articles; and eight others had been exposed to media accounts, including newspaper articles, but the record does not show whether the newspaper articles were the more recent ones or older ones.

Of the twenty-three prospective jurors and alternates who were questioned individually, six were struck for cause either because they expressed fixed opinions on the defendant's guilt or there was some reason they might harbor such an opinion. However, only four of those six had been exposed to newspaper accounts, of those four the exposure of two may have been to older newspaper accounts rather than the two recent articles relied on by the defendant, and of those four one based his fixed opinion on a letter the defendant had written to the newspaper rather than on any news article or articles. It is important to note that the trial judge appears to have been especially attuned to the possibility of juror prejudice, and in fact sustained every challenge for cause based on a juror's fixed opinion or prior knowledge.

Only two of the remaining seventeen prospective jurors and alternates were struck or excused. Both had been exposed to a newspaper article or articles, but it is not clear that the articles were either or both of the recent ones, and in neither case was pretrial publicity the ground for the striking or excusal. One of the two was excused for medical reasons, and one was struck because he believed a State's witness was a liar and he could not give the State a fair trial.

Of the remaining fifteen prospective jurors and alternates, seven had been exposed to one or more of the two recent newspaper articles, two had been exposed to older newspaper articles, four had been exposed to media publicity but the record does not show when, one had no prior knowledge, and one had merely discussed with a coworker that both had pending jury duty, at which time the co-worker had stated she thought it was a murder trial for which they had

been called. Each of these fifteen prospective jurors and alternates, whether exposed to pretrial publicity or not, stated in some manner one or more of the following: that the juror had no opinion regarding the merits of the case; that the juror had no bias for or against either party; that the juror had an open mind regarding the case; that the juror could be fair; and that the juror could base his or her decision on the evidence presented at trial. None were challenged for cause and the record discloses no basis for such a challenge.

The record thus demonstrates that approximately one-half of thirty-six prospective jurors and alternates had been exposed to some pre-trial media reports about the case, and it is possible that most all of the one-half had been exposed to one or more of the recent newspaper articles. It must be recognized, however, that this is to be expected in a case of high profile in a relatively small community. Additionally, the Iowa Supreme Court in *Siemer* determined that a high percentage of jurors having a general familiarity with the case prior to trial was not sufficient to require a change of venue, because the trial court had exercised abundant caution in dismissing for cause prospective jurors who had negative attitudes toward the crime or the defendant. *Siemer*, 454 N.W.2d at 861.

Although all but one member of the initial panel admitted a general familiarity with the crime based on news reports, the court exercised abundant caution in dismissing for cause the venire persons who held negative attitudes toward the crime, generally, or against Siemer, particularly.

Id. The trial judge did the same in this case. Further, as in *Siemer*, no juror who was seated professed any fixed belief concerning Mills' guilt.

As discussed above, the relevant question in determining juror prejudice is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits that he or she cannot judge the defendant's guilt or innocence impartially. *Walters*, 426 N.W.2d at 138; *Gavin*, 360 N.W.2d at 819. Thus, since all of the final jury members as to whom there may have been some concern stated that they could be fair and held no fixed opinion on Mills' guilt or innocence and were not unduly influenced by the recent articles, there was no substantial likelihood of juror prejudice.

Finally, Mills argues that the close proximity in time between publication of the two articles and the start of the trial further created a substantial likelihood that a fair and impartial trial could not be had in Clinton County. One of the factors the court must consider is the articles' timing in relation to the trial. *Siemer*, 454 N.W.2d at 860; *Walters*, 426 N.W.2d at 139; *State v. Voelkers*, 547 N.W.2d 625, 630 (Iowa App. 1996). However, the purpose of such an inquiry is to determine if enough time has passed between publication of the material in question and the trial date so as to "dissipate any prejudicial effect that may have been initially created by the adverse publicity." *Walters*, 426 N.W.2d at 139. The very limited number of prospective jurors who harbored any fixed opinion concerning Mills' guilt as a result of the recent newspaper articles demonstrates that any prejudicial effect that may have been initially created by the articles had dissipated by the time of trial.

We conclude that the record does not demonstrate a substantial likelihood a fair and impartial jury could not be impaneled in Clinton County. Despite the articles published two and three days before the start of trial, the jurors selected

were fair and impartial. None appeared to hold such a fixed opinion of the merits of the case that he or she could not impartially judge Mills' guilt or innocence. The trial court did not abuse its discretion in denying Mills' motion for a change of venue.

AFFIRMED.