

FILED

APR 23 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

176

Plaintiff-Appellee,

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Filed April 23 1986

vs.

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6-17
85-554

RONALD RAY, SR.,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Pottawattamie County (No. 19646)

- Glen McGee, Judge.

Defendant appeals his conviction of second degree sexual abuse asserting that the trial court erred by denying his motion for a change of venue and his motion for new trial based upon a juror's failure to disclose her hostile relationship with a person facing an unrelated sexual abuse charge. **AFFIRMED.**

Eric H. Leed, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and E. A. Westfall, Assistant County Attorney, for plaintiff-appellee.

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

SNELL, J.

Defendant Ronald Ray, Sr., was charged with second degree sexual abuse in violation of Iowa Code section 709.3(2) (1983). The victim was his eleven-year-old daughter, Amy. A jury found Ray guilty as charged and he was sentenced to a term not to exceed twenty-five years.

On appeal Ray contends that: (1) the trial court erred by denying his motion for a change of venue on the ground of pretrial publicity; (2) the trial court erred by denying his motion for a new trial based on a juror's misconduct; and (3) the verdict is not supported by substantial evidence.

Motion for Change of Venue. We review the evidence de novo to determine if the trial court abused its discretion in denying a motion for change of venue. State v. Pelelo, 247 N.W.2d 221, 223 (Iowa 1977). The movant bears the burden to show entitlement to a change of venue. State v. Dague, 206 N.W.2d 93, 94 (Iowa 1973).

Ray contends that the trial court erred by denying his motion for a change of venue. He asserts that he could not receive a fair trial in Pottawattamie County because publicity concerning sexual abuse cases had increased shortly before his trial and a local citizens' group had begun a campaign to encourage harsher treatment of alleged sexual offenders. The citizens' group campaign, which allegedly included direct contact with judges to encourage harsher treatment, had started after the well-publicized disappearance of an alleged sexual offender who had been released on his own recognizance pending trial. Ray's case was the first sexual abuse case to come to trial in Pottawattamie County following the disappearance of the other sexual offender.

An unreported hearing on Ray's motion for change of venue was held on February 8, 1985. The trial court denied the motion finding "no adequate reason or record made in support thereof." Ray does not point to any documentary

evidence in support of his allegation on appeal. The record reveals no newspaper articles, television or radio show scripts, or affidavits to substantiate his claim. It therefore is impossible for us to examine the publicity to determine if it was objective and factual, or misleading, inaccurate, and inflammatory.

"Generally, it is defendant's obligation 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)). "A defendant may waive error by failing to provide this court with a record which affirmatively shows the basis of the alleged error." State v. Campbell, 294 N.W.2d 803, 811 (Iowa 1980); See also State v. Robbins, 257 N.W.2d 63, 68 (Iowa 1977) (where record does not include the transcript of the hearing complained of, an appellate court has nothing to review). We find that in the case at bar, Ray's assertions as to pretrial publicity are not verified by the record and, therefore, Ray has waived any error based thereon.

Nonetheless, even assuming that Ray's assertions regarding pretrial publicity are correct, we do not find that they demonstrate a substantial likelihood that Ray could not receive a fair trial in Pottawattamie County. Iowa R. Crim. P. 10(9)(b) provides that a change of venue must be granted when the court is satisfied such prejudice exists in the county of a scheduled trial that there is a substantial likelihood a fair and impartial trial cannot be had there. "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).

In this case, none of the alleged publicity mentioned Ray by name, nor was it directed toward his trial. Any publicity regarding sexual offenders in general does not establish a reasonable likelihood that Ray could not receive

a fair trial in Pottawattamie County. See Spargo, 364 N.W.2d at 208 (pretrial generalized accounts of child molestation did not establish defendant charged with sexual abuse could not obtain a fair trial). We hold that the trial court did not err in overruling Ray's motion for change of venue.

Juror Misconduct. Ray next contends he was prejudiced by a juror's failure to disclose during voir dire that her former son-in-law was facing a sexual abuse charge and that she had a hostile relationship with that former son-in-law. Ray asserts that he was unable to make an informed decision to challenge for cause or peremptorily strike juror Lois Exline from the jury panel because she failed to disclose her relationship with another alleged sexual offender. Therefore, Ray argues he was denied his right to trial by an impartial jury.

"Jury misconduct justifies a new trial only if the defendant produces proof, by competent evidence, that the misconduct 'was calculated to, and it is reasonably probable that it did, influence the verdict.'" Christianson, 337 N.W. 2d at 504 (quoting State v. Cuevas, 288 N.W.2d 525, 535 (Iowa 1980)). Trial courts possess broad discretion in deciding whether evidence of alleged jury misconduct warrants a new trial. Id. at 504.

We note in this case that the record contains neither a transcript of the voir dire examination nor any jury questionnaire. Ray has again failed to provide us with a record affirmatively disclosing the basis of the alleged error. See Christianson, 337 N.W.2d at 504-505. Ray has not demonstrated that juror Exline was asked any questions that would elicit the information about her ex son-in-law's charge of sexual abuse. Ray has also failed to show that any alleged misconduct by juror Exline likely influenced the verdict. We conclude that the trial court properly denied Ray's motion for new trial on this ground.

Sufficiency of Evidence. Ray also argues that the verdict is not supported by sufficient evidence. Ray concedes that Amy was sexually abused, but claims

that his teenage sons were the perpetrators. Amy's testimony was the only evidence directly linking him to the abuse and Ray asserts that her testimony was not credible because it was vague as to the times and circumstances of the abuse.

In determining whether a conviction is supported by substantial evidence, we view all of the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). "If there is substantial support for the verdict in the record, the jury verdict is conclusive." State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978). Evidence is "substantial" when a reasonable mind would accept it as adequate to reach a conclusion. Robinson, 288 N.W.2d at 338.

There is no question that Amy suffered sexual abuse by her two older brothers. However, the evidence is equally clear that Amy also suffered sexual abuse by her father, Ray. Amy testified that Ray had been abusing her about once a week since she was eight or nine years old. The abuse occurred when her mother was away during the evening giving toy demonstration parties or attending Avon meetings. Amy detailed numerous sexual acts which Ray forced upon her or forced her to perform upon him. On October 22, 1984, Amy told her school nurse that Ray had hit her in the eye. When a social worker contacted Amy regarding the incident, Amy also admitted that Ray had been sexually abusing her. Amy testified that the most recent incident of abuse by her father occurred in early October during the evening when her mother was away. Ray came into the bathroom, fondled Amy, then forced her to perform fellatio and ejaculated into her mouth. Amy stated that she had not reported the abuse before because Ray had threatened her. Amy's mother testified that she often worked evenings giving toy parties. She gave toy parties on September 24, September 28, and October 8, 1984.

We conclude that the foregoing constitutes substantial evidence supporting the jury's verdict. A rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.

AFFIRMED.