IN THE COURT OF APPEALS OF IOWA

No. 3-025 / 92-467

FILED
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STATE OF IOWA,

Appellee,

vs.

SCOTT DAVID NEUENDORF,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Scott Neuendorf appeals from his conviction, following a jury trial, of sexual abuse in the second degree. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Alfredo Parrish and Andrew J. Dunn of Parrish & Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

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

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SCHLEGEL, J.

The defendant, Scott Neuendorf, appeals his conviction, following a jury trial, of sexual abuse in the second degree in violation of Iowa Code section 709.3(1) (1991). Neuendorf raises four issues on appeal: (1) insufficient evidence; (2) ineffective assistance of counsel; (3) change of venue; and (4) denial of challenge for cause to one juror. We reverse for a new trial.

On the evening of September 5, 1991, Maria Spates alleged that the defendant, Neuendorf, and David Oltrogge ordered her into a car at gunpoint, drove to a place in the country, assaulted her viciously, and committed various acts of sexual abuse upon her. Both the defendant and Oltrogge were charged with second-degree sexual abuse. On January 24, 1992, a jury found Oltrogge guilty as charged.

Because of pretrial publicity and because of the press coverage of Oltrogge's trial, Neuendorf moved for a change of venue. The change of venue was denied by the court. At trial, the jury returned a verdict finding Neuendorf guilty of sexual abuse in the second degree, and failed to find that Neuendorf used a firearm in the commission of the crime. Neuendorf filed a motion for new trial, which was denied by the trial court. He was then sentenced upon the conviction.

Neuendorf raises several issues. Since we find the issue of the court's denial of challenge for cause to juror Brandt to be dispositive of this case, we discuss only that

issue on appeal. Neuendorf contends he is entitled to a new trial because the trial court refused to remove prospective juror Brandt for cause, resulting in the necessary use of one of his peremptory challenges to remove the juror.

The defendant challenged juror Brandt for cause based upon the following examination and exchange:

(Examination of Juror Brandt)

> **MR. FERGUSON** (the prosecutor): First of all, do you know anything involving the case involving Mr. Neuendorf?
>
> **JUROR BRANDT:** I only know what I read in the newspaper.
>
> **MR. FERGUSON:** So I take it that the information that you know about in case [sic] -- or Mr. Neuendorf's or Mr. Oltrogge's case came from the newspaper?
>
> **JUROR BRANDT:** That's right.
>
> **MR. FERGUSON:** Did you have any other source other than the newspaper?
>
> **JUROR BRANDT:** No.
>
> **MR. FERGUSON:** Can you tell me as best as you can recall what you remember reading or what the paper reported the evidence or testimony to be in that case?
>
> . . . .
>
> **JUROR BRANDT:** They picked up a woman off the street in downtown Waterloo, took her to an undisclosed place, I don't remember the place, was forced -- she was forced into having sex; and she was dropped off somewhere and found her way back to report it to the police and that the first person was found guilty.

MR. FERGUSON: Okay. Obviously the question is, is that [sic] with that information do you think you can be impartial in this case and judge this person's guilt or innocence on what happens in that courtroom and not what you read?

JUROR BRANDT: I'm afraid I probably would find it difficult. I figure that a jury's found one of them guilty, probably the other is a co-partner and probably equally as guilty [emphasis added]; but if I were forced into it, I would try to do it fairly; but I honestly think that I [sic] would be hard.

MR. FERGUSON: Well, I appreciate your honesty; and that's important because we only have one time to talk to you folks about this; and that's important that you let us know what your true feelings are about that.

I don't have any further questions of Ms. Brandt. I don't know if Ms. Knock does.

COURT: Ms. Knock?

. . . .

MS. KNOCK: . . . If you had a loved one on trial such as a son or a daughter, given the knowledge that you you [sic] have, would you feel comfortable being a juror on that case?

JUROR BRANDT: I probably wouldn't want me on the case. I'd probably want someone who hadn't read the outcome of the prior trial.

. . . .

COURT: Ms Brandt, I want you to know that there are no right or wrong answers to it; and if you honestly feel you should not serve, then you should not serve. I can appreciate that having read newspaper articles involving Mr. Oltrogge, as you say, it might be hard for you to draw a distinction between Mr. Oltrogge and Mr. Neuendorf; but, nonetheless, that will be your responsibility if you're selected to serve. I can appreciate that it would be difficult to make that distinction, but would you make every reasonable effort to draw that distinction to judge Mr. Neuendorf only on the facts of Mr. Neuendorf's case and to put out of your mind as best you can any preconceived notions that what happened in Mr. Oltrogge's case ought to also happen in Mr. Neuendorf's case?

JUROR BRANDT: Yes. I think that would be the fairest thing I could do if I were chosen to do that --

COURT: Can we count on you to make every reasonable effort to draw a hard and fast line between Mr. Oltrogge and Mr. Neuendorf? Mr. Neuendorf's case has to be judged only on what Mr. Neuendorf did, and whatever Mr. Oltrogge did, Mr. Neuendorf has every right to expect that a jury will judge him only on Mr. Neuendorf's conduct. Do you understand that?

JUROR BRANDT: I hear you.

COURT: And will you make every reasonable effort to do just that, to judge Mr. Neuendorf only on what Mr. Neuendorf did or did not do?

JUROR BRANDT: I will try.

After the defendant's challenge for cause of juror Brandt was overruled by the court, the defendant exercised all of his strikes. One of his strikes was used to strike juror Brandt. This directly raises the question of whether the district court erred in refusing to sustain defendant's challenge of this juror for cause.

> [I]f a disqualified juror is left upon the jury in the face of a proper challenge for cause, so that defendant must either use one of his peremptory challenges or permit the juror to sit, and if defendant does use all of his peremptory challenges, prejudice will be presumed. State v. Reed, 201 Iowa 1352, 1354, 208 N.W. 308. Defendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause.

State v. Beckwith, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951); see also State v. Woodyard, 414 N.W.2d 654, 657 (Iowa App. 1987).

Juror Brandt expressed definite reservations about her ability to be fair. She opined that she would not be the type of juror she believed should sit on the case. In her response to the prosecutor, she specifically stated:

> . . . I figure that a jury's found one of them guilty, probably the other is a co-partner and probably equally as guilty; . . .

The best the attorney for the State, the attorney for the defendant, or the court could learn from juror Brandt about her ability to be fair and to reach a decision based only on the evidence presented during the case was expressed to the court during its examination of Brandt, when Brandt stated, "I will try." Given the honest reservations, concerns and preconceived feelings which Brandt expressed in her answers on voir dire, this reply was not enough to ensure a fair and impartial juror.

> [T]rial courts should use the utmost caution in overruling challenges for cause in criminal cases when there appears to be a fair question as to their soundness. . . . Although a ruling may be technically right, if it must be so doubtful as to raise a fair question as to its correctness, it is far better to give the accused the benefit of the doubt, to the end that he and all other men may be satisfied that his rights have not been invaded. Confidence in the fairness and impartiality of each member of a jury, which shall be sworn to try a man on a charge involving his life or liberty, is of the greatest importance to the welfare of the state. Indeed, it is of such paramount importance to every citizen that the time and expense necessary to secure jurors as to whom no doubt may rightly exist is an insignificant consideration.

(Emphasis added.) Beckwith, 242 Iowa at 238-39, 46 N.W.2d at 26. "The trial court has a large, but not unlimited, discretion in allowing or disallowing challenges for cause

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in criminal cases." Id., 242 Iowa at 232, 46 N.W.2d at 23. We believe that under the circumstances of this case, the court abused its discretion in overruling the defendant's challenge for cause of juror Brandt. In requiring defendant to remove that juror by the use of a peremptory challenge or a strike, it is presumed defendant suffered prejudice. Id. Neuendorf's conviction is reversed, and the case is remanded to the district court for a new trial.

Defendant has raised other issues on this appeal. However, since defendant will have a new trial, those issues need not be decided in this appeal. They are, by reason of the decision here, rendered moot. We reverse defendant's conviction and remand the matter to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent to the majority's reversal of the defendant's conviction of sexual abuse in the second degree. The district court did not abuse its discretion in overruling the defendant's challenge for cause of juror Brandt.

A challenge for cause may be made where the juror has "formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." Iowa R. Crim. P. 17(5)(k). A juror's knowledge of a codefendant's guilty verdict is not a recognized ground for a challenge for cause. See generally Iowa R. Crim. P. 17(5). A juror's knowledge that the codefendant has been convicted of the same offense does not create a presumption of prejudice. See State v. Simmons, 454 N.W.2d 866, 868 (Iowa 1990) (citing Arnold v. State, 751 P.2d 494, 499 (Alaska App. 1988). Also, a juror's "mere reservation about impartiality" may not be a recognized ground for a challenge to cause. See Simmons, 454 N.W.2d at 868.

In this case, juror Brandt candidly admitted the difficulties she would face in trying to be impartial. However, she never stated she would be unable to be impartial or that she had a fixed opinion as to the defendant's guilt. Juror Brandt conceded she would make every reasonable effort to distinguish the defendant's case

from the prior codefendant's conviction and to put aside any preconceived notions regarding the defendant's guilt.

At this point, it was incumbent upon the district court to observe juror Brandt's demeanor and credibility and assess her ability to serve as an impartial juror. The district court took an active role in determining whether juror Brandt could be impartial as reflected in the direct questioning which took place between the trial judge and juror Brandt. It was on the basis of this questioning and the district court's own observations that the court refused to strike juror Brandt for cause.

Our standard of review is not to substitute our judgment as if we were sitting as the trial judge. Rather, our review is to determine if the judge's discretion, regardless of whether we would have similarly ruled or not, was abused. I find the district court did not abuse its discretion in refusing to strike juror Brandt for cause. I would affirm the district court on this issue.