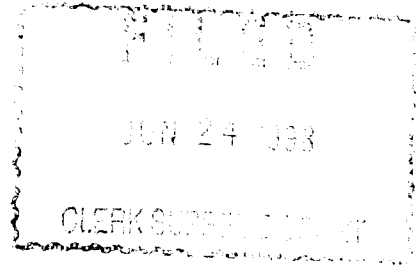


IN THE COURT OF APPEALS OF IOWA

No. 8-197 / 97-0636
Filed June 24, 1998



STATE OF IOWA,
Appellee,

vs.

KIMMI LYNN HARDY,
Appellant.

Appeal from the Iowa District Court for Lee County, D.B. Hendrickson, Judge.

Defendant appeals the judgment and sentence entered upon her conviction of first-degree murder, second-degree kidnaping, and child stealing in violation of Iowa Code sections 702.2, 710.3, and 710.5 (1995). **AFFIRMED.**

Alfredo Parrish of Parrish Kruidenier Moss Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Kimmi Lynn Hardy appeals the judgment and sentence entered upon her conviction of first-degree murder, second-degree kidnaping, and child stealing in violation of Iowa Code sections 702.2, 710.3, and 710.5 (1995). We affirm.

I. Background Facts and Proceedings.

Hardy was charged with these offenses following an investigation into the disappearance of Theresa Lund and her infant son, Paul. Investigators, based on an anonymous tip, found Paul living with Hardy and her husband, Robert.

Hardy told police she purchased Paul from Anthony Matrona for \$1500, a handgun, and an antique shotgun. She also told police Matrona placed Lund's body in a crawl space under her home and that Robert and she later disposed of Lund's body to avoid implication in her death. Based on information Robert provided police, Lund's body and the handgun used to kill her were eventually located.

Prior to trial, Hardy moved for a change of venue. She cited extensive media coverage of these events and hostile public commentary by law enforcement officials and the county attorney. The district court denied Hardy's motion finding insufficient prejudice to Hardy's chances for a fair trial to warrant a change of venue.

Hardy also moved to suppress evidence obtained as the result of statements Robert made to the police. She argued, without reference to specific conversations, that the source of Robert's information were privileged spousal communications inadmissible against her at trial. In its ruling, the court noted the marital privilege

does not extend to conversations with third parties and is limited to testimony at trial. However, the court declined to make a definitive ruling on this issue “in the absence of the State proffering specific items of evidence or testimony of witnesses.”

At trial, Robert testified that after expressing concerns about the odor in their house, Hardy told him it was something other than a sewer problem. He also testified that he had no reason to believe the body found in the basement was Theresa Lund until Hardy gave him a different explanation. Robert further testified Hardy told him to tell people he helped deliver their baby in August 1996.

Lund’s mother, Velva Green, testified over Hardy’s objection that Lund told Green she had renewed an acquaintance with a woman matching Hardy’s description who offered to give her baby clothes. Green also testified Lund described the woman as persistent in asking Lund to lunch at the woman’s home.

Hardy was convicted as charged. The district court sentenced her to life in prison without parole.

Hardy appeals. She argues the district court erred in denying her motion for change of venue and her motion to suppress testimony containing privileged spousal communications. She also contends the district court erroneously admitted hearsay testimony from Lund’s mother, Velva Green. Additionally, Hardy also maintains the evidence was insufficient to support her first-degree murder conviction. Finally, Hardy asserts she was denied effective assistance of trial counsel.

II. Change of Venue.

We review a refusal to grant a motion for a change of venue de novo. *State v. Wagner*, 410 N.W.2d 207, 210 (Iowa 1987). However, the decision to grant or refuse a change of venue rests primarily in the district court's discretion, and we will reverse that decision only when the discretion has been abused. *Id.*

Pretrial publicity warrants a venue change when "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." Iowa R. Crim. P. 10(10)(b). A defendant seeking reversal of a conviction based on the denial of a motion for change of venue must show either actual prejudice on the part of the jury or the publicity attending the case was so pervasive and inflammatory prejudice is presumed. *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989).

Hardy contends that actual and presumed prejudice necessitated a change of venue. She argues actual prejudice existed because every juror claimed to have some knowledge of the case, five jurors had unfixed opinions regarding Hardy's guilt, and one juror stated a suspicion of Hardy's guilt. Hardy claims the extent and content of media reports about her case were sufficient to establish presumptive prejudice.

A juror's mere exposure to news accounts of the case does not amount to a substantial likelihood for prejudice. *State v. Hoeck*, 547 N.W.2d 852, 861 (Iowa App. 1996). None of the seated jurors expressed an inability to deliver an impartial verdict

based on the evidence presented at trial despite exposure to news accounts of the case. We accordingly find Hardy fails to demonstrate actual prejudice existed.

In determining whether media coverage is presumptively prejudicial necessitating a change of venue, we consider whether the accounts: indicate the defendant's guilt; are factual and informative or inflammatory in tone; contain editorial denunciations of the defendant or emotional stories about the defendant or victim; or are inaccurate, misleading or unfair. *Id.* We also consider the length of time which elapsed between the accounts and the trial date and whether jurors with known knowledge of the case stated they could decide the case impartially on the basis of the evidence presented at trial. *Id.*

Upon carefully reviewing the news articles and considering the appropriate factors, we conclude the publicity was not so pervasive and inflammatory that we can presume Hardy was denied a fair trial. The articles were predominantly factual, informative, and accurate. Some of the reports carried a sensational tone; however, they were no more sensational than that inherent in the crimes alleged. *See State v. Siemer*, 454 N.W.2d 857, 861 (Iowa 1990)(citing *State v. Walters*, 426 N.W.2d 136, 139 (Iowa 1988)(distinguishing "sensational reporting of a routine crime" from "routine reporting of a sensational crime").

Although negative inferences may be drawn from reported statements of law enforcement officials characterizing Hardy as "stoic" and a "very good thespian," as well as the county attorney's comment Lund's murder was "cold," "calculated," and

the product of “premeditation,” the prejudicial effect of the reports does not rise to the level of pervasive and inflammatory publicity required to warrant a venue change. We cannot say the district court abused its discretion in denying Hardy’s request for a change of venue on these grounds. We affirm the district court’s ruling.

III. Motion to Suppress.

Hardy asserts the district court improperly denied her motion to suppress Robert’s testimony regarding privileged marital communications.

Iowa Code section 622.9 prohibits the use of privileged marital communications at trial. Iowa Code § 622.9 (1995) (“neither husband nor wife can be *examined* in any case as to any communications made by one to the other while married, nor shall they, after the marriage relationship ceases, be permitted to reveal *in testimony* any such communications made while the marriage subsisted.”)

Hardy’s motion to suppress specifically sought to exclude evidence the State obtained as a result of pretrial statements Robert made to police, not specific testimonial evidence. The motion did not challenge Robert’s testimony itself based on marital privilege, and Hardy did not object to Robert’s testimony at trial.

We find Hardy has failed to properly preserve error on this issue. *See State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995) (citations omitted) (“when a party fails to alert the district court to its contentions, that party cannot thereafter rely on those contentions to seek a reversal on appeal”).

IV. Sufficiency of the Evidence.

Hardy contends the purely circumstantial evidence the State presented at trial was insufficient to establish the elements of first-degree murder.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A guilty verdict is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational jury the defendant is guilty beyond a reasonable doubt. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). In determining the sufficiency of the evidence, we view the record in the light most favorable to the State. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). We consider all of the evidence, not merely the evidence supporting the verdict. *Id.* Direct evidence and circumstantial evidence are equally probative provided the evidence raises a fair inference of guilt and does more than create speculation, suspicion, or conjecture. *Id.*

The jury convicted Hardy of first-degree murder, pursuant to Iowa Code section 702.2, based on the following findings: (1) Hardy shot Lund; (2) Lund died as a result of being shot; (3) Hardy acted with malice aforethought; and (4) Hardy was participating in the offense of kidnaping in the second degree.

Upon reviewing the record, we find sufficient evidence for the jury to infer Hardy committed first-degree murder. Kim Steele, Hardy's friend, testified she witnessed Hardy buy a .380 caliber handgun and file the serial numbers off the gun

less than one month before Lund's murder. Robert Harvey, a firearms expert with the Division of Criminal Investigation, testified he analyzed the two bullets found in Lund's head and at least one was fired from Hardy's .380 caliber handgun. There was also evidence connecting Hardy and Lund before the murder. William Buckner, Lund's neighbor, testified he saw Hardy's truck parked at Lund's home three times during the summer of 1996, and he witnessed Hardy and Lund speaking to each other on one occasion.

Hardy admitted faking the last week of her pregnancy. However, Hardy told friends and family she had given birth at home and Paul was her son. Theresa Maness, Hardy's friend, visited Hardy the day she allegedly gave birth. She testified Hardy told her "she had really done it this time -- done something really bad and she couldn't finish it and had to ask [her husband] Bob to help her."

Based on this and other evidence in the record, we find a rational juror could infer Hardy shot and killed Lund with malice aforethought in an attempt to kidnap Lund's son. We affirm on this issue.

V. Hearsay Objections.

Velva Green, Lund's mother, testified over objection that Lund had renewed the acquaintance of a "tall, red-headed lady that we supposed to come over with some baby clothes for Theresa, not that she really needed any more, but she said the woman

just kept persisting that she wanted her to have lunch and come over and get the baby clothes.”¹

Hardy argues the challenged testimony is inadmissible hearsay. She further argues the court’s admission of this evidence unduly prejudiced her.

We review the district court’s evidentiary rulings for an abuse of discretion. *State v. Jones*, 511 N.W.2d 400, 405 (Iowa App. 1993). Assuming without deciding the testimony was inadmissible hearsay evidence, we fail to see how Hardy was prejudiced by the district court’s error. *See State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996)(defendant cannot establish prejudice based on the admission of hearsay evidence where substantially similar evidence has been admitted but not objected to).

Substantially similar evidence was introduced through the testimony of Charlene Hiskey, Lund’s sister-in-law, and Shirley Alford, Lund’s friend, without objection. Hiskey testified:

She [Lund] said that an old acquaintance had looked her back up and had some baby clothes for her, wanted to give her some baby clothes, and was very persistent about going to lunch with her. She kept wanting her to go to lunch.

Alford testified that on August 27, 1996, Lund “told me that some girl named Pam with red hair and a gray pick up truck was supposed to come by with some baby clothes.”

¹ Green’s physical description of the “woman” fit Hardy’s description.

We conclude Hardy was not prejudiced by the district court's alleged error. The court did not abuse its discretion in admitting the challenged testimony. We affirm on this issue.

VI. Ineffective Assistance of Trial Counsel

Hardy asserts she was denied effective assistance of trial counsel. She cites counsel's failures to: (1) file a motion to suppress the testimony of Wendell Smith, Hardy's former husband; (2) renew Hardy's motion for a change of venue after voir dire; (3) object to Robert's testimony regarding marital communications; and (4) present insanity or diminished responsibility defenses.

A successful ineffective assistance of counsel claim requires a showing: (1) counsel's performance fell outside the normal range of competency; and (2) but for counsel's errors, there is a reasonable probability the outcome of the proceedings would have been different. *State v. McKettrick*, 980 N.W.2d 52, 55 (Iowa 1992). The claimant has the burden of proving both of these elements by a preponderance of the evidence. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). We approach ineffective assistance of counsel claims with a strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

Hardy's claim based on counsel's failure to renew her motion for a change of venue is without merit. We have already concluded the district court did not abuse its discretion in denying Hardy's motion for a change of venue. Because Hardy

cannot establish she was prejudiced by counsel's omission, we find counsel was not ineffective for failing to renew Hardy's motion at the conclusion of voir dire.

Smith testified that in 1993 Hardy told him their child was stillborn, his body was donated for organs, and the remains would be shipped to them by UPS. Hardy asserts she was prejudiced by this privileged testimony because it tended to show "how far Hardy would go to cover up a failed and/or alleged pregnancy."

Assuming without deciding Smith's testimony was objectionable, we find there is not a reasonable probability the jury's resolution of this issue would have been different but for the admission of this testimony. Counsel was not ineffective for failing to file a motion to suppress Smith's testimony.

Where the record on direct appeal is not adequate to permit us to resolve an issue, we preserve the defendant's claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives trial counsel the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We find there is an inadequate record for us to adjudicate Hardy's ineffective assistance of counsel claims based on trial counsel's failures to present insanity or diminished responsibility defenses and object to Robert's testimony without counsel's explanation for his performance. We, therefore, preserve these claims for postconviction review.

The decision of the district court is affirmed.

AFFIRMED.