IN THE COURT OF APPEALS OF IOWA

No. 5-528 / 94-1243

FILED
FEB 02 1996
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JOHNNY G. JOHNSON,

Appellant.

Appeal from the Iowa District Court for Lee County, William L. Dowell, Judge.

Defendant appeals judgment and sentence, following jury trial, entered upon his conviction of interference with official acts causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas G. Fisher, Jr., and Robert J. Glaser, Assistant Attorneys General, and Michael Short, County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

HAYDEN, P.J.

On February 15, 1994, an inmate assaulted four employees in the kitchen of the Iowa State Penitentiary Due to this incident, all inmates were directed back to their cells.

Correctional officer Rodney Jenkins went to Cellhouse 219 to assist in the lock down. Inmate Johnny Johnson was standing in front of his cell. Jenkins asked Johnson if this was his cell, and Johnson answered affirmatively. Jenkins testified the next thing he knew he was laying on the floor and Johnson was standing over him. He stated Johnson then kicked him.

Lieutenant Daniel George, the cellhouse supervisor for Cellhouse 219, became aware there was a disturbance when he heard prisoners cheering. George ran to the area of the disturbance and saw Johnson repeatedly kicking Jenkins. George then called for backup. After other officers arrived, Jenkins was carried from the scene and taken to the hospital. . He suffered a fractured sinus bone, a broken tooth, and had several welts on his face.

Johnson was charged with interference with official acts inflicting a bodily injury, in violation of Iowa Code section 719.1 (2) (1993) and with being an habitual offender, in violation of section 902.8.

Prior to trial, Johnson filed a motion for change of venue claiming there was a substantial likelihood, due to pretrial publicity, he would not be able to receive a fair trial in Lee County. He submitted copies of thirty-seven newspaper reports which

related to four separate incidents at the prison. The district court denied the motion for change of venue, finding few of the articles referred to Johnson, and those which did refer to Johnson were informational in nature.

The case proceeded to trial before a jury in Lee County. Johnson testified Jenkins spat in his face when he was putting him in his cell. Johnson stated he turned around to go report the matter to Lieutenant George, when Jenkins grabbed him and said, "Get in your cell, nigger." Johnson stated Jenkins pushed him, and he pushed back, and they then began to exchange blows. Johnson admitted kicking Jenkins after he was down on the floor.

Johnson also presented the testimony of several other inmates who testified they had been subjected to racial slurs by guards, including Jenkins. One inmate corroborated Johnson's testimony Jenkins had made a racial statement as he was putting Johnson in his cell.

On cross-examination of Johnson, the State presented a letter he had written to Dennis Henderson, the inmate who had assaulted employees in the kitchen. The letter advocated violence against "blue eyed devils." The letter stated, "there will always be a fight between us and the devils, as long as they are 'unchecked.'" Johnson admitted writing the letter, but stated he wrote it on behalf of another inmate whose letter-writing privileges had been suspended.

The jury found defendant guilty of the crime charged. Johnson was also found to be an habitual offender. Johnson was sentenced to a term of imprisonment not to exceed fifteen years. He now appeals.

I. Johnson claims the district court abused its discretion in denying his motion for change of venue. Between February to April 1994, there were three incidents involving the penitentiary in Fort Madison in addition to the incident in question here: (1) Henderson's attack on employees in the kitchen; (2) an attempted escape by two inmates; and (3) a successful escape by two inmates from a prison farm. These four incidents generated a total of thirty-seven articles in the Fort Madison *Daily Democrat*, the Burlington *Hawkeye*, *The Des Moines Register*, and the Keokuk *Daily Gate City*. Johnson claims these four incidents were likely linked in the public mind, and the publicity attending the four incidents was so pervasive and inflammatory prejudice must be presumed.

The State argues Johnson failed to preserve error on this issue because no record was made during jury selection to demonstrate the alleged bias of jurors. Although we question whether error has been preserved, we nonetheless address the issue on the merits.

A motion for change of venue should be granted if such a degree of prejudice exists in the county in which the trial is to be had there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from the county. Iowa R. Crim. P. 10(10)(b). A defendant relying on jury prejudice as a ground for reversal must

show publicity attending the trial is so pervasive and inflammatory prejudice must be presumed, or show actual prejudice on the part of the jury. *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990).

Here, defendant is claiming prejudice should be presumed due to the pervasive and inflammatory nature of publicity attending the trial. In considering whether publicity rises to the level of presumptive prejudice, we consider three factors: (1) the nature, tone, and accuracy of the articles; (2) their timing in relation to the trial; and (3) the impact on the jurors as revealed through voir dire. *Id.*

Our review of the newspaper articles shows they were all informational in nature, and did not sensationalize the crime. Most of the articles were about the other incidents at the prison and did not mention defendant. Two months had elapsed from the date of the most recent article directly referring to defendant and the date of the start of trial. Furthermore, there is no record the publicity had an impact on jurors. We find no evidence of pervasive and inflammatory publicity attending this trial. We conclude the district court did not abuse its discretion in denying defendant's motion for change of venue.

II. Johnson contends there is insufficient evidence in the record to support his conviction. In particular, he claims there is insufficient evidence he interfered with Jenkins while he was acting in the performance of his duties. Defendant believes Jenkins was not performing his assigned duties as a correctional officer when the fracas began, because Jenkins spit on him and called him a "nigger."

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980).

We find there is substantial evidence in the record to support defendant's conviction for interference with official acts causing bodily injury. The jury is free to believe or disbelieve the testimony of witnesses as it sees fit. *See Garr*, 461 N.W.2d at 174. The jury is not required to accept the defendant's version of the facts. *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990). Thus, the jury was not required to believe the testimony of Johnson and the other inmates. Furthermore, Johnson admits Jenkins was attempting to put him back in his cell at the time of the disturbance.

We find there is sufficient evidence in the record to show Jenkins was acting within his official duties when he was assaulted by Johnson.

III. Defendant claims the district court abused its discretion in admitting into evidence the letter he wrote to Henderson. Defendant believes the letter is irrelevant to the case because he wrote it for another inmate and it did not reflect his feelings.

We review questions of admissibility of evidence for an abuse of district court discretion. *State v. Buller*, 517 N.W.2d 711, 712 (Iowa 1994). Under Iowa Rules of

Evidence 402 evidence must be relevant in order to be admissible. Evidence is relevant under rule 401 when it has a tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

We find the letter was relevant. The court properly allowed the jury to decide whether to believe defendant's claim he wrote the letter for another, or whether the letter accurately reflected his views advocating violence against correctional officers. We find no abuse of discretion in the district court's decision to admit the letter into evidence.

IV. Defendant contends the district court abused its discretion by allowing copies of legal records into evidence during the habitual offender portion of the trial. The State submitted mittimuses for each of defendant's prior convictions, but did not submit certified copies of his convictions. Deborah Nichols, the records administrator at the penitentiary, testified she received the mittimuses from the sheriff when defendant arrived at the facility. Defendant claims the documents should not have been admitted because they were hearsay.

We find the records were admissible under rule 803(6), which excepts from the hearsay rule records of regularly conducted activity. Rule 803(6) applies to records kept in the course of a regularly conducted business activity. The documents which were presented to the court constituted the institution's legal authority to hold the

prisoner, and such records are kept in the regular course of business by the institution. We believe these records are reliable.

Furthermore, we note defendant does not claim the criminal convictions which were presented during the habitual offender portion of the trial were incorrect. He is only claiming certified copies of these convictions should have been presented. We conclude the district court did not abuse its discretion in admitting the mittimuses into evidence.

V. Finally, defendant claims he received ineffective assistance of counsel. He believes he received ineffective assistance due to his counsel's failure to object to the jury panel. We determine this issue should be preserved for postconviction proceedings.

We affirm defendant's conviction for interference with official acts causing bodily injury and being an habitual offender. Costs of this appeal are assessed to defendant.

AFFIRMED.