IN THE COURT OF APPEALS OF IOWA

FILED
APR 22 1987
CLERK SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed April 22, 1987
RICHARD WAYNE SHELDON,	)	6-464 85-1647
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Clinton County (No. K-6311), C. H. Pelton, Judge.

The defendant appeals from his conviction, following a jury trial, of kidnapping in the first degree and robbery in the first degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and G. Wylie Pillers III, Clinton County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J.

In this appeal, defendant Richard Wayne Sheldon challenges his conviction by jury for first degree kidnapping and first degree robbery. Sheldon has raised two issues for appellate consideration: First, he contends that the trial court erred in denying his motion for a change of venue; in addition, Sheldon argues that the court should have suppressed certain testimony regarding an allegedly suggestive photographic array. Finding both contentions without merit, we affirm.

Before addressing the specific issues presented, we find it necessary to set forth the following facts. The incident leading to Sheldon's conviction occurred on January 30, 1985. That night, Judi Kennedy was working the midnight to 6:00 a.m. shift as a clerk at the Merchantile Mart in Grand Mound, Iowa. Judi's friend, Angela Burkey, testified that she planned to spend the night at the store with Judi in order to keep her company.

At approximately 2:00 a.m., a man entered the store, looked around, and left. Shortly thereafter, he returned and purchased a loaf of bread. After paying for the bread, he produced a gun and demanded that the women give him the money in the cash register. He then ordered them to accompany him to his car. After forcing them into the car, he drove toward Calamus, Iowa, and turned onto a number of gravel roads. Later, he stopped the automobile and forced the women to perform various sex acts with him and with one another. Eventually, he took them to the basement of an abandoned farm house where he tied them to a chair. The women were able to free themselves later that morning by chewing through the rope. The defendant was subsequently arrested after being identified as the assailant.

The record discloses that approximately one week before the defendant's trial was scheduled to begin, Angela Burkey filed a lawsuit against the owner

of the Merchantile Mart alleging that his negligence proximately caused the injuries which she sustained as a result of the kidnapping. Although media interest in the incident had been relatively dormant since its occurrence, the filing of the lawsuit renewed interest and a number of local newspaper articles ensued. Several of these articles quoted directly from Ms. Burkey's petition and printed the allegation that the defendant had "abducted plaintiff from the 'Merchantile Mini-Mart,' raped her, and tied her naked to a tree in freezing weather to die." Pursuant to Iowa Rule of Criminal Procedure 10(10)(b), the defendant promptly filed a motion for a change of venue in which he asserted that the recent publicity engendered local prejudice making it impossible for him to receive a fair trial in Clinton County. After a hearing, the trial court concluded that the story had not been made the subject of major headlines, nor had it been sensationalized, and denied the motion. The defendant challenges this ruling.

The principles governing a request for a change of venue are well established. A defendant seeking the reversal of his conviction on the basis of an allegedly improper denial of his motion for a 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). The defendant in the present controversy makes no argument concerning actual jury prejudice; rather, he contends that the pretrial publicity created a presumption of prejudice. In examining his contention, we review the record de novo. State v. Robinson, 389 N.W.2d 401, 403 (Iowa 1986). Having done so, we conclude that the trial court did not abuse its discretion in denying his request.

The courts of this state have considered an array of cases concerning alleged prejudice resulting from pretrial publicity. Our review of these cases

discloses the existence of a number of factors generally considered in determining whether a trial court abused its discretion in denying a motion for a change of venue. Among these factors are the following: (1) the inflammatory or noninflammatory nature of the publicity, State v. Robinson, 389 N.W.2d at 403; State v. Spargo, 364 N.W.2d at 207; (2) the degree to which the publicity was disseminated throughout the locale, State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980); (3) the length of time between the dissemination and the trial, State v. Spargo, 364 N.W.2d at 207; and (4) the care exercised or difficulty encountered in selecting the jury, State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). See also Sullivan, Criminal Trial Procedure, 43 La. L. Rev. 375 (1982).

We have carefully scrutinized the record in light of these considerations, and are persuaded that the trial court properly ruled upon the defendant's motion. Initially, we generally agree with the trial court that the publications in question cannot fairly be characterized as inflammatory. The record reflects that although three local newspaper articles and one radio broadcast published the allegation contained in Ms. Burkey's petition, each of the articles also conveyed the proper rendition of the facts revealed by the police. In addition, none of the articles or the broadcast indicated that the defendant was guilty of the charges against him, nor did they contain editorial comment to this effect; rather, each stated that he was "accused" or "charged" with the commission of the "alleged" offense. In short, each of the publications basically consisted of a brief factual account of the allegations comprising the lawsuit. In these circumstances, we find this case indistinguishable from State v. Cornelius, 293 N.W.2d at 269, in which the supreme court stated that the "[m]ere exposure to news accounts does not prove there is a substantial likelihood of prejudice in the minds of the prospective jurors in the county in which the

trial is to be held." See also State v. Spargo, 364 N.W.2d at 207; State v. Ware, 338 N.W.2d 707, 713 (Iowa 1983); State v. Chadwick, 328 N.W.2d at 916; State v. LeMatty, 263 N.W.2d 559, 562 (Iowa App. 1977).

Furthermore, we find nothing in the record indicating that the attitude in the community had become saturated with hostility toward the defendant or that the parties had encountered difficulty selecting impartial jurors because of extensive exposure through the articles. See Cornelius, 293 N.W.2d at 269; cf. State v. Robinson, 389 N.W.2d at 403. The most troubling consideration in this case is the relatively short period of time between the publicity and the defendant's trial. We conclude, however, that the short time span cannot be said to have been prejudicial because the articles were not inflammatory nor destructive in nature. Accordingly, we hold that the trial court did not abuse its discretion in overruling the motion.

The defendant next contends that the trial court erred in refusing to suppress testimony regarding an allegedly suggestive photographic array. In support of this contention, he argues that the photographic identification array shown to the victims by the police was unnecessary, contained the photos of too few suspects, and improperly highlighted his photograph. Upon our de novo review of the record, however, State v. Newman, 326 N.W.2d 788, 793 (Iowa 1982), we are convinced that the procedure used by the police was not impermissibly suggestive. Consequently, we find no error in the trial court's refusal to suppress the challenged testimony.

We briefly set forth the principles governing our resolution of the defendant's contention. In State v. Neal, 353 N.W.2d 83, 86 (Iowa 1984), the supreme court stated that in order to succeed upon a claim of this nature, the defendant must establish that the challenged procedures were suggestive and that the irregularities resulted in a "substantial likelihood of the irreparable misidentifi-

cation in the totality of the circumstances." The court further stated that in ascertaining whether the defendant has made the requisite showing, we are required to engage in a two-tiered inquiry:

> [W]e must first consider whether the procedures used to identify the defendant were suggestive. If not, the evidence was not suppressible, and any shortcomings in the identifications only go to the weight or credibility assigned to the evidence by the fact finder. Conversely, if the procedures were impermissibly suggestive, we must determine whether, in the totality of the circumstances, the identification of defendant as the perpetrator was nonetheless reliable.

State v. Neal, 353 N.W.2d at 87. Because of our conclusion that the procedures in the present case were not suggestive, we need not reach the reliability issue.

The defendant complains that the photographic identification was improper because the State did not show that it, rather than a lineup, was necessary. In Neal, the supreme court confronted the identical argument and concluded that "[t]he use of a photographic array rather than a corporeal lineup in the investigative stage is usually constitutionally permissible." 353 N.W.2d at 87. As in Neal, although the defendant in the instant case was a suspect, he had not yet been arrested and the case was still in its investigative stage. As such, we find no merit in the defendant's complaint. See Neal, 353 N.W.2d at 87.

Similarly, we find no merit in the defendant's assertion that the array was impermissably suggestive because it only contained the photographs of six suspects. In Neal, the supreme court explicitly stated that there is "no per se requirement that a least six photographs must be used in a display." 353 N.W.2d at 89. In that case, the court rejected the defendant's contention that a display with only four photos was improperly suggestive. Id. See also Williams v. McKenzie, 576 F.2d 566, 572 (4th Cir. 1978); Haberstroh v. Montanye, 493 F.2d 483, 484 (2d Cir. 1974).

Finally, we disagree with the defendant's contention that his photograph was impermissibly highlighted. Although his photo did not contain a county placard like the other five, we do not think that this minor disparity can be regarded as suggestive. We have examined each of the photos and find the placards hardly noticeable; the angle of the photos focuses on the suspects' features rather than the positioning of county placards. Relatedly, we dispose of the defendant's assertion that, because he did not have a profile shot, his photo was suggestive. We think that a more relevant inquiry is whether the suspects' physical characteristics were similar or whether the defendant's were notably disparate. See Neal, 353 N.W.2d at 88. In this connection, we note that each of the suspects in the photo array were of similar height and weight, had the same types of facial hair, and several wore glasses; thus, each tended to satisfy the description given by the victims. In these circumstances, we are not persuaded that the defendant's photo so differed from the others in the display as to be considered suggestive. Accordingly, we conclude that the trial court's ruling is affirmed.

AFFIRMED.