

IN THE COURT OF APPEALS OF IOWA

No. 6-695 / 95-1742

STATE OF IOWA,

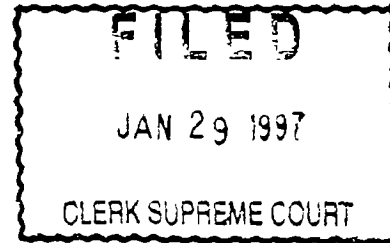
Plaintiff-Appellee,

vs.

CARLOS DAWAUN MONTFORD,

Defendant-Appellant.

000449



Appeal from the Iowa District Court for Linn County, David M. Remley
(change of venue) and Lynne E. Brady (trial), Judges.

Defendant appeals from his conviction of voluntary manslaughter in violation
of Iowa Code section 707.4 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Adams and Andi S.
Lipman, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County
Attorney, for appellee.

Heard by Habhab, C.J., and Cady and Huitink, JJ.

HABHAB, C.J.

On March 17, 1995, Kevin Eatman and Tayo Washington went into a grocery store in Cedar Rapids. They encountered defendant Carlos Dawaun Montford and another man. Harsh words were exchanged. Defendant and the other man followed Eatman and Washington out of the store. A vehicle then drove up and two of its occupants, Terrell Heath and Eddie Appleton, joined defendant and the other man in chasing Eatman and Washington through the parking lot. During the chase, Eatman tripped and fell. The group then surrounded Eatman and began kicking him. Heath produced a gun and shot Eatman three times. Eatman died as a result of the attack.

Defendant was charged with first-degree murder and possession of a firearm by a felon. He was arraigned on April 27, 1995. On June 13, 1995, he filed a motion for change of venue citing inflammatory pretrial publicity. In its resistance, the State did not assert the motion should be denied because it was untimely. The motion was denied on July 24, 1995. The court concluded many of the news accounts had been about the victim, not defendant; there had been a significant passage of time between the news reports and the commencement of the trial; and Linn County was a large county which would make it easier to seat a fair and impartial jury.

Defendant's motion to sever the counts was granted and a trial on the murder charge began July 31, 1995. Defendant renewed his motion for change of venue and it was overruled. Defendant also requested the jury be given an instruction on assault

as a lesser-included offense of murder. His request was denied. The jury found defendant guilty of the lesser-included offense of voluntary manslaughter and defendant was sentenced to a term not to exceed ten years.

On appeal, defendant argues the court erred in denying his motion for a change of venue. He argues there was pervasive and inflammatory pretrial publicity which was replete with extremely prejudicial and inadmissible information. He contends the nature of the pretrial publicity resulted in presumptive and actual prejudice. Defendant also argues the court erred in failing to instruct the jury on assault as a lesser-included offense. He argues the failure to give an assault instruction was not a harmless error because he was ultimately convicted of one of the lesser-included offenses and one of his theories of defense was that his participation in the incident constituted only an assault.

The State contends defendant has not preserved error on the venue issue because he did not timely file his motion for change of venue. Iowa R. Crim. P. 10(4). If we reach the merits of defendant's claim, the State maintains the publicity was not so inflammatory that it would deny him a fair trial. The State assumes, without conceding, the district court erred in not submitting the requested jury instruction on assault. The State argues the omission did not prejudice defendant because the jury's rejection of the greater-included offense of involuntary manslaughter negates his claim the jury would have found him guilty of the lesser offense of assault. The State

also contends defendant's primary theory of defense was an alibi defense and the absence of an assault instruction had no bearing on this defense.

I. Change of Venue. A motion for change of venue must be filed no later than forty days after arraignment. Iowa R. Crim. P. 10(2)(f), 10 (4). Defendant was arraigned April 27, 1995. His motion for a change of venue was not filed until June 13, 1995. The State contends defendant has not preserved this issue for our review as the motion was untimely, although the State did not initially resist the motion on these grounds. We find defendant has not properly preserved this issue for our review. However, for the purposes of this opinion, we will assume error has been preserved.

Our unique review of a district court's denial of a motion for a change of venue due to pretrial publicity is *de novo*, to determine whether the district court's decision constitutes an abuse of discretion. *State v. Means*, 547 N.W.2d 615, 622 (Iowa App. 1996) (citing *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990); *State v. Love*, 302 N.W.2d 115, 122 (Iowa 1981)); see *State v. Voelkers*, 547 N.W.2d 625, 629 (Iowa App. 1996).

Iowa Rule of Criminal Procedure 10(10)(b) states pretrial publicity warrants a change of venue 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." Where a change of venue has been denied, the test is whether there is a reasonable likelihood the defendant could

receive a fair trial in the county. *State v. Dague*, 206 N.W.2d 93, 95 (Iowa 1973); *State v. Farmer*, 492 N.W.2d 239, 241 (Iowa App. 1992).

In our de novo review of the record, we have considered the news broadcasts and articles within the record and the voir dire of the jury. We find the district court did not abuse its discretion in denying defendant's motion for change of venue.

When considering the appropriateness of the district court's denial of a motion for change of venue:

We . . . look to see whether enough time had passed between the accounts and the trial date to dissipate any prejudicial effect of adverse publicity; whether panel members who professed knowledge of the case state they could render an impartial verdict on the basis of the evidence presented at trial; and whether the trial judge sustained strikes for cause against jurors who stated they could not render an impartial verdict due to their prior knowledge.

Id. (citing *Walters*, 426 N.W.2d at 139); *see also Siemer*, 454 N.W.2d at 860. A defendant may show either proof of actual prejudice or that pretrial media accounts were so pervasive and inflammatory as to give rise to a presumption of prejudice. *State v. Shipley*, 429 N.W.2d 567, 576 (Iowa App. 1988); *Farmer*, 492 N.W.2d at 241.

We have weighed the publishing of the majority of the news accounts against the defendant's trial date and affirm the district court's finding that a significant amount of time elapsed between the majority of the news accounts and defendant's

trial. We find this lapse of time was sufficient to dissipate any prejudicial effect that may have initially existed. *See State v. Spargo*, 364 N.W.2d 203, 208 (Iowa 1985).

Defendant points out that seven potential jurors voiced doubts about their inability to be impartial. These jurors were properly excused for cause by the district court and did not serve as jurors at trial. We look not to what a juror has been exposed to, but rather whether the juror holds a fixed opinion of the merits of the case such that he or she is unable to judge impartially the guilt or innocence of the defendant. *See Walters*, 426 N.W.2d at 139; *State v. Hoeck*, 547 N.W.2d 852, 861 (Iowa App. 1996). We agree with the district court's finding that voir dire of prospective jurors should be trusted to expose any substantial prejudice among them. *Walters*, 426 N.W.2d at 138.¹ We find that no jury members who professed knowledge of the case stated they would be unable to render an impartial verdict on the basis of the evidence presented at trial.

From our de novo review of the record, we find the pretrial publicity falls short of constituting the "extensiveness and hostility to a defendant . . . required to give rise to a presumption of prejudice." *Spargo*, 365 N.W.2d at 208. Furthermore, defendant

¹ We note a juror need not be completely ignorant of the issues and events involved in a trial. *Murphy v. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589, 594-95 (1975); *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985); *State v. Voelkers*, 547 N.W.2d 625, 629 (Iowa App. 1996). Furthermore, mere exposure to news accounts does not prove a substantial likelihood of prejudice. *State v. Chadwick*, 328 N.W.2d 913, 916 (Iowa 1983); *State v. Farmer*, 492 N.W.2d 239, 239 (Iowa App. 1992).

has not established any jury member held fixed opinions regarding his guilt, and as such we find he failed to show actual prejudice. *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985). We find no substantial likelihood such a degree of prejudice existed in Linn County which prevented defendant from the receipt of a fair and impartial trial.

II. Lesser-Included Offense of Assault. Defendant was charged with first-degree murder and possession of a firearm by a felon. The jury was instructed as to the lesser-included offenses of voluntary and involuntary manslaughter. The jury rendered a verdict against defendant for voluntary manslaughter and for aiding and abetting a person armed with a firearm.

We assume, without deciding, the district court erred in not submitting the requested jury instruction on assault. However, we reject defendant's contention he was prejudiced by this omission, as assault did not coincide with his primary theory of defense. See *State v. Negrete*, 486 N.W.2d 297, 298 (Iowa 1992). Defendant did not rely on simple assault as his primary defense at trial, but rather primarily relied on an alibi defense. Defendant testified at trial he was not present at or involved in Eatman's shooting. He produced four witnesses who gave alibi testimony on his behalf. The jury was given an alibi instruction.

Defendant alternatively argued he did not have the requisite intent to commit murder. The submission of the involuntary manslaughter instruction gave the jury ample opportunity to consider this defense.

“We have followed the general rule that the jury’s rejection of a greater-included offense negates a defendant’s claim of prejudice due to a district court’s failure to submit an instruction on a lesser-included offense.” *Negrete*, 486 N.W.2d at 299 (citations omitted). As the jury rejected involuntary manslaughter in favor of the greater voluntary manslaughter offense, we find defendant has not shown prejudice by the omission of the simple assault offense. *See id.*

AFFIRMED.