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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-373 / 93-1185

STATE OF IOWA,

Appellee,

vs.

RAYVELL ANTOINE VANN,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from judgment and sentences imposed upon his convictions of assault while participating in a felony and possession of a firearm by a felon, in violation of Iowa Code sections 708.3 and 724.26 (1993). **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ. Huitink, J., takes no part.

HAYDEN, P.J.

On January 31, 1993, Carlton Shannon and his girlfriend, Kimberly Davis, drove to a Sioux City bar. Shannon went into the bar while Davis stayed in the car. Rayvell Vann approached Davis and asked her why a $150 check she had written him had bounced. Davis told Vann to talk to Shannon.

Shannon came out of the back door of the bar. Vann grabbed him and placed a gun to his head. A struggle ensued during which Vann shot Shannon in the leg. Another shot was fired, but missed Shannon. Shannon ran through the bar, out the front door, and jumped onto a taxi cab telling the driver to leave the area. The driver instead waited for police to arrive. By the time law enforcement arrived, Davis and Vann were gone.

Officers later arrested Vann in a hotel room. Vann told officers he took the gun from Shannon during a fight over Shannon's girlfriend and he shot Shannon in the leg by accident. Vann was charged with, among other things, assault while participating in a felony and being a felon in possession of a firearm.

The public defender was appointed to represent Vann. About six weeks before trial, Vann filed a pro se motion to substitute appointed counsel. He contended the public defender had a conflict of interest by previously representing Shannon. After a hearing, the motion was denied.

On the day before trial, Vann moved for a continuance so he could retain counsel of his choice. The trial court denied the request. On the morning of trial, attorney Kay Dull testified she had been approached by Vann's relatives about possibly representing him. She also testified she had not been retained, had not told Vann she represented him, and had informed him a continuance was unlikely. Vann testified he believed Dull was going to be retained by his mother. Consequently, he informed one of his witnesses not to appear for the scheduled trial date because he assumed the trial would be continued. The trial court denied Vann's renewed motion for a continuance, concluding Vann was attempting to delay the trial.

Vann moved for a change of venue, alleging pretrial publicity prejudiced his ability to receive a fair trial. The motion was denied. Potential jurors who expressed any prior knowledge of the case were individually examined in chambers and excused for cause. Vann renewed his motion for change of venue, contending the panelists could not be adequately questioned without "poisoning" them. The renewed motion was denied.

After trial, Vann was convicted of assault while participating in a felony and being a felon in possession of a firearm. Before the jury returned its verdicts, Vann stipulated he had been twice previously convicted of felonies.

Vann's counsel filed an extensive motion for new trial and motion in arrest of judgment. Vann filed a pro se motion for new trial in which he alleged newly-discovered evidence and ineffective assistance of trial counsel. Vann requested he be appointed new counsel for the posttrial motions. The trial court denied the motion for new counsel and ordered trial counsel to provide assistance on the newly-discovered evidence claim. The court informed Vann he could pursue his ineffectiveness claims in postconviction relief, but if Vann chose to pursue the claims now, he would have to do so pro se. Vann elected to proceed, and a series of six hearings were held on the posttrial motions. After the hearings, all posttrial motions were overruled.

Vann was sentenced to two consecutive fifteen-year terms of imprisonment, with a five-year mandatory minimum. Vann now appeals. He contends (1) he was denied a fair trial by the trial court's denial of his motion for a change of venue; (2) the trial court erred in refusing to grant a continuance on the eve of trial to allow him to retain counsel of his choice; and (3) he was denied his right to counsel during posttrial motion hearings concerning his claims of ineffective assistance of counsel. Each issue will be discussed in turn.

I. **Denial of Change of Venue Motion.**

The first issue is whether the trial court erred in failing to grant the defendant's motion for a change of

venue. The right to a fair trial by jurors is guaranteed under the Iowa and federal constitutions. State v. Siemer, 454 N.W.2d 857, 860 (Iowa 1990) (citations omitted). As such, the court on appeal reviews the record de novo to determine whether the trial court's decision to deny a change of venue demonstrates an abuse of discretion. Id. (citations omitted).

A defendant seeking reversal on the basis of a denial of a motion for change of venue must show (1) publicity attending the trial was so pervasive and inflammatory prejudice must be presumed or (2) actual prejudice on the part of the jury. Id. at 860; State v. Spargo, 364 N.W.2d 203, 207 (Iowa 1985).

A. Presumption of Prejudice.

Vann argues pretrial publicity was "so pervasive and inflammatory prejudice must be presumed." He was particularly concerned about the statements in the press the incident was drug- or gang-related. In determining the existence of presumptive prejudice, the court examines several factors, including the nature, tone, and accuracy of the articles; their timing in relation to the trial; and the impact of the publicity on the jurors as revealed through voir dire. Siemer, 454 N.W.2d at 860; State v. Walters, 426 N.W.2d 136, 139 (Iowa 1988) (citations omitted).

An examination of these factors demonstrates no presumptive prejudice exists. First, Vann has not shown he

has been prejudiced by the nature, tone, and accuracy of the media reports. For the most part, the reports are short, factual, and nonsensational.

Second, the timing of the reports in relation to the trial supports our conclusion. Almost all of the publicity concerning Vann appeared during the week after the incident, which occurred on January 31, 1993. There was then very little subsequent publicity of a substantive nature before the trial on April 20, 1993. See State v. Nebinger, 412 N.W.2d 180, 185 (Iowa App. 1987) (three-month period between radio account and trial dissipated any prejudicial effect); State v. Misner, 410 N.W.2d 216, 220 (Iowa 1987) (news accounts confined to short period following crime and separated from trial by four-month period); State v. Spargo, 364 N.W.2d 203, 208 (Iowa 1985) (two to three month interval); State v. Johnson, 318 N.W.2d 417, 423 (Iowa 1982), cert. denied, 459 U.S. 848 (1982) (three-month interval).

As to the third factor, the impact of the publicity on the jury as revealed through voir dire, the record reveals it had very little, if any impact. Most of the jurors who had heard or read anything had only a vague or general recollection. With the exception of a single juror, all of those jurors were excused, for cause, from the panel.

B. Actual Prejudice.

Vann also argues "the exclusion of five to eight potential jurors for cause . . . based on pretrial

publicity resulted in actual prejudice" because it denied him "an adequate opportunity to choose from a pool of potential jurors who had no prior knowledge of the case." Vann's argument rests on the possibility one or more of the jurors selected may have been exposed to media publicity surrounding the shooting and may have been subconsciously influenced by those prior contacts. This argument has nothing to do with the legal test for actual prejudice. It focuses not on what information a juror has been exposed to, but rather on whether the juror holds a fixed opinion on the merits of the case. State v. Lanscak, 404 N.W.2d 192, 193-94 (Iowa App. 1987).

Moreover, Vann's argument is based on speculation and is contradicted by the record. Several jurors recalled news accounts of the incident and were excused. One more had her memory triggered by evidence presented at trial and brought this to the attention of the court. At that time the court reminded the other jurors to come forward if they had also recalled anything. From this procedure it is apparent if people have been exposed to a news event they either remember immediately or their memory may be triggered by some later detail. However, Vann presented no evidence to support his theory jurors have a "subconscious" memory of news events which somehow escapes their conscious memory and, at the same time, causes them to be prejudiced against the subject of those news accounts.

In the case at bar, all twenty-four prospective jurors, with only one exception, had no prior knowledge of the case. Vann has thus failed to prove actual prejudice.

Based on the above, Vann had failed to prove either actual or presumptive prejudice resulting from the trial court's denial of his motion for change of venue. The trial court is affirmed on this issue.

II. Denial of Motion for Continuance.

Vann contends the trial court erred in refusing to grant a continuance on the eve of trial to allow him to retain counsel of his choice. We disagree.

Appellate review of a trial court's ruling on a motion for continuance is for abuse of discretion. State v. Slayton, 417 N.W.2d 432, 435 (Iowa 1987) (citation omitted). Our review of the record convinces us there was no abuse of discretion here.

It was the eve of trial when Vann moved for a continuance. At this late date, Vann still had not retained his own counsel. Nor was Vann prejudiced by the denial of his request for a continuance. First, it was his own fault LaSinda Cook was not available to testify on his behalf. It was unreasonable for him to assume the trial would be continued, especially after Attorney Dull had told him it probably would not be. Moreover, it was later revealed Cook's testimony would have been of little value. She was inside the bar when the scuffle and shooting took place outside.

Second, Vann's trial counsel did a thorough and creditable job of investigating the case and defending him at trial. He had taken the deposition of Davis and Shannon. He had obtained Davis's bank records for purposes of possible impeachment. He had obtained Shannon's medical records for the same reason. He had done criminal checks of all the State's witnesses. He had pursued the issue of what the taxi driver might have observed. He had personally gone to the 7-Eleven Club to view the physical layout. His investigator had checked the firing pin marks on the shells to see if they were consistent with having been fired by the same gun. He had talked to Dana Anderson and decided he would not be a helpful witness because he had seen Vann waving the gun. He had decided not to take the deposition of the police officers because he wanted them to come into the trial "cold." He had plea bargained in good faith with Vann's best interest in mind and had kept Vann informed of all developments in the case. He was successful in keeping any mention of "drugs" or "gangs" out of the case. At trial he vigorously cross-examined the State's witnesses and otherwise protected all of Vann's constitutional due process rights.

Based on the record, the trial court did not abuse its discretion in denying Vann's last-minute request for new counsel and a continuance of the trial.

III. **Right to Counsel**.

Defendant claims he was denied his constitutional right to counsel during posttrial motion hearings. When a

defendant alleges the denial of a constitutional right, the appellate review is de novo, based on the totality of the circumstances. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984) (citations omitted).

Under the guarantees of the Sixth Amendment, counsel must be provided for any defendant who is unable to employ counsel, unless defendant's right to counsel is competently and intelligently waived. Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963). The Sixth Amendment guarantees also entitle a defendant to assistance of counsel at all critical stages of the proceedings which may affect the outcome of his case. United States v. Wade, 388 U.S. 218, 226 (1967).

We grant defendant preservation of his posttrial claims for an action in postconviction relief, where his claims may be fully investigated and presented with the assistance of counsel.

Judgment of the trial court affirmed.

AFFIRMED.

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