FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-238 / 89-1133

698

STATE OF IOWA,

Appellee,

vs.

BILL GENE FARRIS,

Appellant.

Appeal from the Iowa District Court for Jones County, Larry J. Conmey, Judge.

The defendant was accused of sexually abusing his five-year-old daughter. A jury found him guilty of second-degree sexual abuse and lascivious acts with a child. He has appealed from the resulting convictions. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Connie S. Ricklefs, County Attorney; for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

Bill Farris was accused of sexually abusing his five-year-old daughter. He was charged with second-degree sexual abuse and lascivious acts with a child.

On the day before jury selection began, the Cedar Rapids Gazzette, a Cedar Rapids newspaper published in adjoining Linn County carried a lengthy article about sexual abuse of children. Farris sought a change of venue or a continuance. He alleged he could not get a fair trial because of this publicity concerning child sexual abuse. The district court refused to grant Farris the relief he sought.

A jury found Farris guilty of second-degree sexual abuse and lascivious acts with a child. He appeals. We affirm.

Farris' trial was held in Jones County, where the crimes occurred.

Farris contends the district court erred by refusing to grant him either a change of venue or a continuance. He argues the Cedar Rapids newspaper's article about sexual abuse of children was widely read in nearby Jones County, and he could not get a fair trial so soon after the article's publication.

Our review of this case is confined to errors of law. Iowa R. App. P. 4.

Upon review of the record, we hold the trial court did not err in denying the motion for a continuance or a change

of venue. The article was not featured on the front page, but rather towards the middle of the newspaper. The paper was not published in the county where the trial was held. No contention is made either defendant or the case was mentioned in the article. Rather, it seems the article was general in nature, describing the extent of the child sexual abuse problem.

Trial counsel for defendant was aware of the article before voir dire. He elected not to question the voir dire panel on whether they had read the article. He also elected not to request the judge to give cautionary instructions to the jury regarding the article. Trial counsel's decisions were tactical in nature. State v. Losee, 354 N.W.2d 239, 244 (Iowa 1984). Counsel chose not to attempt to insulate the jurors from the article by means of jury instructions or voir dire questioning.

Finally, the record shows the evidence presented against the defendant was abundant and appears to be conclusive. We purposefully do not recite the facts of this crime. In light of the graphic evidence and damaging testimony of the little girl, the jury was fully justified in finding defendant guilty.

Prejudice must be shown before any error requires reversal. State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980) An error of constitutional magnitude does not mandate a new trial if the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828,

17 L. Ed. 2d 705, 710-11 (1967); State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980); Cole, 295 N.W.2d at 40; State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979). The State has the burden of proving harmless error beyond a reasonable doubt. Chapman, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710; Cole, 295 N.W.2d at 40.

We hold, if any error was preserved for our consideration on appeal, it was shown to be harmless beyond a reasonable doubt. Defendant was not prejudiced.

AFFIRMED.

Donielson, P.J., and Hayden, J., concur; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

Without a recitation of why the failure to grant a change of venue was nonprejudicial, it is an abuse of our discretion as an appellate court to hold that the purported error was "harmless beyond a reasonable doubt."