

IN THE COURT OF APPEALS OF IOWA

No. 4-058 / 93-0562

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MARILYN DENISE REACH,

Defendant-Appellant.

Appeal from the Iowa District Court for Humboldt County, Allan L. Goode, Judge.

Defendant appeals her convictions on two counts of child endangerment causing serious injury. **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish, Kruidenier, Moss & Dunn, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor and Julie H. Brown, Assistant Attorneys General, and Kurt J. Stoebe, County Attorney, for appellee.

Heard by Schlegel, P.J., and Habhab and Cady, JJ., but decided by Donielson, P.J., Habhab, J., and Schlegel, S.J.* Cady, J., takes no part.

*Senior judge from the Court of Appeals serving by order of the Iowa Supreme Court.

HABHAB, J.

Defendant, Marilyn Denise Reach, appeals her convictions on two counts of child endangerment causing serious injury. We affirm.

On November 14, 1991, Reach gave birth to S.B. Bobby Joe Brandenburg is the father of S.B. Brandenburg confessed to physically abusing S.B. while Reach was not present. He recalls three incidents of abuse, but does not deny he abused the child more often. The first incident he remembers took place in December 1991 when he squeezed the baby's legs. When Reach asked about the bruises on S.B.'s legs, Brandenburg said "it was just from his socks being too tight."

A few weeks after that incident, he squeezed the child's stomach. He explained the bruises to Reach by saying S.B.'s diapers were too tight.

On February 27, 1992, Brandenburg was caring for S.B. while Reach was gone. When S.B. started crying, he hit and shook him. S.B. stopped breathing and Brandenburg called 911.

The doctors who treated S.B. at the hospital observed bruises on his forehead, chest, lower abdomen and back which differed in color, indicating various ages. In addition to the visible bruises, S.B. had several injuries which predated February 27, including eleven broken ribs, a broken bone in his hand, an injured tibia and a skull fracture.

The State filed a trial information charging Reach with five counts of child endangerment causing serious injury, alleging that she knowingly permitted the continuing abuse of S.B. After a jury trial, Reach was convicted of two counts of child endangerment causing serious injury, in violation of Iowa Code section 726.6 (1)(a), (2) (1991), class "C" felonies. Count I involved the brain injury suffered by S.B. on or around February 27, 1992. Count II involved a skull fracture, two broken ribs, and an injured tibia suffered by S.B. on or around February 20, 1992. Reach appeals.

I. Sufficiency of Evidence.

Reach argues the evidence was insufficient as a matter of law to convict her. Specifically she argues the State failed to show she knowingly permitted the continuing abuse of her son by Brandenburg.

Our standard of review is well settled. In reviewing motions for a directed verdict and a new trial based upon sufficiency of the evidence in criminal cases, we view the evidence in light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. Similarly, a jury verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

Schrier, 300 N.W.2d at 306 (citations omitted).

From our review of the record, we find there is substantial evidence to support the jury's verdict. We find the following supports the jury's finding that Reach knowingly permitted the continuing abuse of S.B.: (1) the nature and extent of S.B.'s injuries and the sequence of events that led to S.B.'s hospitalization on February 27; (2) the age of S.B. at the time the abuse was occurring; (3) the fact that Reach was S.B.'s primary caregiver; and (4) evidence showing Reach knew of Brandenburg's temper and was afraid of him.

Several doctors testified they observed bruises of differing colors, indicating various ages, on S.B. when he arrived at the hospital. Dr. Sherry Bulten observed approximately eight bruises. Dr. Elizabeth Stoebe noticed several brown bruises which she estimated were three to four or more days old. Dr. Thomas Kelly testified he saw several bruises on S.B.'s forehead, chest, lower abdomen and back of differing colors. Dr. Randall Alexander also observed bruises which he estimated were one and one-half to two weeks old. Both Dr. Alexander and Dr. Kelly noted

it was unusual to have bruising at S.B.'s age, because a child of three months is not yet very active.

Reach admitted she had also observed bruises. She specifically admitted she discovered new bruises on S.B. several times after S.B. had been left alone with Brandenburg. On one occasion, she observed bruises on S.B.'s arm and blamed this on the fact Brandenburg handled S.B. too roughly.

In addition to the bruising, when S.B. was brought into the emergency room on February 27, he had various injuries which predated those sustained on February 27. According to radiologist Dr. Wilbur Smith, S.B.'s x-rays showed a skull fracture, which was one week old; at least eleven broken ribs, which ranged in age from seven days to six weeks; a severe injury to the tibia, which was ten to fourteen days old; and a bone fracture in his hand, which was two weeks old.

Smith testified that at the time of the skull injury, the area surrounding the skull would have been soft and mushy. Reach admitted to DCI Agent Blessman that she observed a soft spot on February 18. Blessman testified Reach told him she decided not to take S.B. to the doctor, however, because she realized Iowa had tough child abuse laws and she did not want her pediatrician to "scold her."

Dr. Smith testified the leg injury would have been quite tender, and that S.B. would not have kicked with the injured leg for a few days. Smith also stated S.B. would

have been in pain and irritable when the leg was touched -- especially during diaper changes. Smith testified S.B.'s hand injury would have caused S.B. considerable pain. Smith stated that both the leg injury and the hand injury would have been obvious to a caretaker.

As for S.B.'s rib fractures, Smith testified S.B. would have been fussy and irritable, especially when he rolled over. S.B. would have difficulty sleeping, would not take deep breaths, and would have been in pain during clothing changes when his hands were raised.

Dr. Alexander agreed with Dr. Smith regarding the outward signs following the various injuries. Dr. Kelly agreed the pain from the rib and hand fractures would have been apparent to S.B.'s caretaker.

The evidence also shows Reach was aware S.B. cried whenever Brandenburg held him. She was also aware of Brandenburg's temper and his past criminal conduct. In a letter Reach wrote to Brandenburg in late December 1991, or early January 1992, she complained of Brandenburg's temper and of his scaring S.B. In another letter dated around February 16 or 17, 1992, Reach stated, "And for [S.B.] HE CAN'T HELP IT. I get where I'm scared of you, and I'm scared for [S.B.]" Reach also admitted to Officer Blessman that she feared Brandenburg's temper and what he might do. Reach also knew Brandenburg sometimes became so enraged he blacked out.

Brandenburg had a criminal history which included disorderly conduct and public intoxication in 1989; terroristic threatening and third-degree assault in February 1990, when Brandenburg attempted to slash his brother's throat with a knife; possession of a prohibited weapon, use of intoxicants and public intoxication in July 1990; and first-degree assault in February 1991, when Brandenburg attempted to run over two children who were walking on the shoulder of the road. Brandenburg was on probation during the time period in question. Reach admitted to psychologist, Dr. Garfield, that she knew of Brandenburg's assault and public intoxication convictions.

Viewing the evidence in the light most favorable to the State, we find the evidence was sufficient to support the jury's verdict.

II. Denial of Change of Venue.

Reach next contends the district court erred in overruling her motion for change in venue based on pretrial publicity. She argues she was entitled to a change of venue to satisfy her due process right to a fair trial under the Fourteenth Amendment and the language of Iowa Rule of Criminal Procedure 10(10)(b).

A defendant who seeks a reversal on such a basis 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). Our review of this issue is de novo. Id. We will reverse only if we find the trial court abused its discretion in denying the motion. Id.

Reach claims the pretrial publicity created a presumption of prejudice. We cannot agree. Mere exposure to news accounts will not create a presumption of prejudice. State v. Ware, 338 N.W.2d 707, 713 (Iowa 1983). To sustain a claim of presumptive prejudice, the defendant must prove the publicity attending the case was "pervasive and inflammatory." State v. Siemer, 454 N.W.2d 857, 860 (Iowa 1990) (citing State v. Harris, 436 N.W.2d 364, 367 (Iowa 1989)).

Whether publicity rises to the level of being presumptively prejudicial depends on the following factors: 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.

Id. (citing State v. Walters, 426 N.W.2d 136, 139 (Iowa 1988)).

After reviewing these factors we find the district court did not abuse its discretion. Reach claims she "was continually mentioned in newspaper accounts as was Bobby Brandenburg up to the time of trial." The district court found "the pretrial publicity has been confined to a relatively short period of time, with the last article in the Humboldt Independent appearing on August 13, 1992, approximately six months prior to the currently scheduled

trial date." We find nothing in the record which contradicts this finding. In addition, we note the district court finding that:

[t]he news articles are factual and informative in nature and tone. They do not contain inflammatory statements or opinions, or continually rehash the story for no articulable reason.

From our review of voir dire of the jury panel we find that, of those jurors who had heard or read something about the case, most were unable to recall any specific details. We find the district court did not abuse its discretion in refusing to grant a change of venue.

III. Ineffective Assistance of Counsel.

Reach next claims she was denied effective assistance of counsel because her trial attorney did not raise a pretrial venue objection with regard to Count II. Reach argues the injuries at issue in Count II (skull fracture, two broken ribs, and an injured tibia) occurred when she, Brandenburg and S.B. were in Ohio. By statute objections to venue must be made prior to trial. See Iowa Code § 803.2(3).

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality

of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

We find defendant's claim under this Division to be without merit. In this regard it cannot go unnoticed that defense counsel did move for a judgment of acquittal as to Count II on the ground the court lacked jurisdiction. Defense counsel asserted, as does appellant counsel on appeal, the alleged offense occurred when defendant, along with S.B. and Mr. Brandenburg, were in the State of Ohio. The court overruled the motion.

We have reviewed the dates of the injuries as established through the medical testimony of Drs. Tom Kelly and Wilbur Smith. In doing so, we find the trial court's ruling as to jurisdiction was correct. In addition, and recognizing that the State bears the burden of proving venue by a preponderance of the evidence, State v. Allen, 293 N.W.2d 16, 19-21 (Iowa 1980), we find that the dates of the injuries as determined from the same medical testimony show the venue was properly placed in Humboldt County, Iowa.

We conclude Reach's trial counsel was not ineffective in failing to raise this venue issue.

AFFIRMED.