

FILED.

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,

)

Appellee,

)

Filed August 9, 1979

vs.

)

SPENCER HASBROUCK,

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62136

Appellant.

)

Appeal from Ida District Court - David J. Blair, Judge.

Defendant appeals a jury conviction of burglary in the second degree in violation of section 713.3, Code Supp. 1978. **AFFIRMED.**

Morris C. Hurd of Ida Grove, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa; and Faison Sessoms, Assistant Attorney General; for appellee.

Heard by Oxberger, C.J., and Donielson and Johnson, JJ. Carter and Snell, JJ., take no part.

Defendant, Spencer Hasbrouck, appeals a jury conviction of burglary in the second degree in violation of section 713.3, Code Supp. 1978. In his motion for new trial, which was overruled, he asserts that trial court erred: (1) in holding court outside the courthouse and by so doing, denied him his right to a public trial; (2) in refusing to give his requested instruction regarding intoxication as it relates to specific intent and in giving instead an intoxication instruction based upon an erroneous statement of the law; (3) in refusing to give his requested jury instruction on pretrial publicity; and (4) in denying his motion for change of venue because of alleged prosecutorial misconduct involving pretrial publicity. We affirm on all issues.

Defendant was arrested at the Ida Grove Country Club on February 28, 1978, and charged with burglary in the second degree in violation of section 713.3, Code Supp. 1978. Trial by jury was held in a basement room of the Ida Grove Post Office due to the fact that the Ida County courtroom had been declared unsafe by the state fire marshal on July 20, 1977. The room in the post office had been designated as the temporary courtroom by James P. Kelley, Chief Judge of the judicial district.

Two days prior to defendant's scheduled trial, the two newspapers in Ida County ran stories regarding a statement made by Laurel L. Boerner, Assistant County Attorney, and prosecutor in defendant's case.¹ The statement, which was totally unrelated to defendant and his upcoming trial, involved a discussion of a tort claim filed for another client by defendant's counsel, Morris C. Hurd. The statement expressed an opinion by Boerner that insurance premiums for the county were increasing because of such claims. Defense counsel filed a motion for change of venue contending this statement constituted prosecutorial misconduct and would so prejudice an Ida County jury against his client, the defendant, that the latter could not receive a fair and impartial trial and required a change of venue. Motion for change of venue was denied and the jury found the defendant guilty of burglary in the second degree.

I. Site of Trial

Defendant asserts that the chief judge had no authority to order court to be held in a basement room of the Ida Grove post office and that, by being tried in said room, he was denied his constitutional right to a public trial.²

¹ The stories were based on a letter from Boerner to the Ida County Board of Supervisors. One newspaper reprinted it, in toto, as a letter to the editor; a second newspaper carried a front page story entitled "Attorney says lawsuits raise insurance rates" and utilized the letter as the basis for the story.

² Defendant also raised these objections at pretrial conference and during trial.

These issues were recently before the Iowa supreme court, in an essentially identical context, in the case of State v. Jones, No. 62137 (Iowa S. Ct., filed June 27, 1979). In Jones, the court held that the chief judge had acted properly in designating a place other than the courthouse for the trial, and that authority to do so was derived from section 602.5, The Code 1977,³ where no usable courthouse was available. Id., slip op. at 3. Further, the court found that "while this 'courtroom' is not likely to be proposed in the future as a model by courthouse consultants, we do not find, on the other hand, that it was so grossly inadequate in size to deny public access or so lacking in proper decorum as to vitiate the proceedings." Id., slip op. at 4-5.

In the instant case, as in Jones, no specific evidence has been introduced from which a factual finding can be made that any proceedings held in the temporary courtroom would be "perverted." Id., slip op. at 5.

As to the public's access to defendant's trial, the test is "not whether the courtroom is large enough to seat everyone who wants to attend, but whether the public has freedom of access to it." Id., citing Caudill v. Peyton, 164 S.E.2d 674, 676 (Va. 1978); Via v. Peyton, 284 F.Supp. 961, 964 (D.C. Va. 1968). Because we find Jones to be dispositive of this issue, we conclude the use of this "courtroom" did not deny defendant his constitutional right to a public trial.

II. Denial of Change of Venue

Defendant contends that statements made by Prosecutor Boerner, which were published two days prior to the impaneling of the jury in his case, so prejudiced any jury that would be selected as to deprive him of a fair and impartial trial. As noted earlier, the statements made no reference to either defendant or his upcoming trial.⁴

While we recognize that defendant's motion was not filed in accordance with Rule 10(4), Iowa R. Crim. P.,⁵ we find that because the publication dates were only two days before the scheduled trial it was proper for the court to entertain the motion. However, on appeal this court must review the record de novo to determine whether the trial court abused its discretion in holding that defendant failed to demonstrate a

³ Section 602.5, The Code 1977, reads in part: "Courts must be held at the places in each county designated by the chief judge of the judicial district. . . ."

⁴ See Defendant's Exhibits 1 and 2 for complete text of statements. Ex. 1 was published as a Letter to the Editor, Ida County Pioneer Record, May 11, 1978; Ex. 2 as a front page story, The Ida County Courier, May 9, 1978.

⁵ "Motions . . . shall be filed either within thirty days after arraignment or prior to the impaneling of the trial jury, whichever event occurs earlier." (Defendant's arraignment was on March 20, 1978.)

substantial likelihood that he could not receive a fair and impartial trial. See Iowa R. Crim. P. 10(9)(b); State v. Paulsen, 265 N.W.2d 581, 588 (Iowa 1978); State v. Pelelo, 247 N.W.2d 221, 223 (Iowa 1976). It was defendant's burden to establish prejudice in fact⁶ or presumed prejudice.⁷

An examination of the record discloses no evidence of any prejudice in fact or even potential prejudice to defendant resulting from publication of the two articles. See Pollard v. District Court of Woodbury County, 260 N.W.2d 519, 520 (Iowa 1972). Neither does the evidence indicate the publicity concerned this case or this defendant. Also, defense counsel did not request a reported voir dire of the jury to support his contention. Id. at 521; State v. Davis, 196 N.W.2d 885, 889 (Iowa 1972). The court has stated that "...when motions to change venue are overruled, counsel on both sides would be well advised to have voir dire examination of the jury reported. Id.; see also State v. Williams, 245 Iowa 494, 62 N.W.2d 742 (1954). We find, therefore, that the trial court did not abuse its discretion in refusing to grant defendant's motion for change of venue.

III. Instructions

Defendant requested two instructions be given the jury by the trial judge. The first concerned his defense of intoxication and the second, according to defendant, was to "neutralize any unwarranted prejudice to defendant occasioned by the prejudicial newspaper accounts."⁸ The trial court refused to give both requested instructions to which defendant made specific objections.⁹

The State contends that defendant has not preserved the record for appeal in a proper fashion, as is required by the rule enunciated in State v. Sallis, 262 N.W.2d 240, 248 (1978), because defendant did not voice specific exceptions when the requested instructions were refused. We find that, by making specific objections at trial¹⁰ when the court presented its preliminary draft of instructions, defendant has preserved the record in a proper manner.

⁶ This requires a showing of actual excitement and hostility among the populace. Harnack v. District Court of Woodbury County, 179 N.W.2d 356, 358 (Iowa 1976) (defendant produced over 100 affidavits showing excitement and hostility).

⁷ Prejudice is presumed because of extensive, repeated and hostile publicity. The determination of prejudice can be based on such evidence as qualified public opinion surveys, opinion testimony or on the court's own evaluation of the nature, frequency and timing of the materials involved. State v. Davis, 196 N.W.2d 885, 889 (Iowa 1972).

⁸ See Appellant's Brief at 42-46.

⁹ See App. 149-152.

¹⁰ See n. 9, supra.

Instead of giving defendant's proposed instruction on intoxication, the court gave Instruction 12,¹¹ which defendant contends constitutes reversible error in that it is an erroneous statement of the law, incorrectly stating that intoxication does not excuse crime. Defendant asserts the court should have instructed the jury that intoxication can negate specific intent, an element of the crime with which defendant is charged. As both parties note in their briefs, Instruction 12 apparently was taken from Iowa Uniform Jury Instruction No. 210¹² (recommended for use by the Iowa State Bar Association, January, 1978), with the addition of one sentence: "At no time does the Defendant have to prove his intoxication; rather, the burden is on the State to prove that the Defendant was able to and did form the specific intent required, together with the other elements or propositions constituting the offense of burglary in the second degree."

The Iowa court has stated that "[i]f an instruction covers the legal principles involved, as they are raised by the facts in the case, the trial court has the right to choose its own language to best accomplish that purpose." State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974). Also, the court frequently has noted that instructions must be viewed as a whole, not piecemeal. State v. Templeton, 258 N.W.2d 380, 383 (Iowa 1977); State v. Pelelo, 247 N.W.2d 221, 225 (Iowa 1977); State v. Robinette, 216 N.W.2d

¹¹ See App. 146-147.

¹² No. 210. Intoxication as a Defense to Offense reads:

The defendant has claimed that at the time and place of the commission of the offense he was intoxicated. The fact that a person is under the influence of intoxicants (drugs) does not excuse nor does it aggravate his guilt. However, intoxication may be shown where it is relevant to the person's specific intent at the time of the act charged.

However, even though a person is under the influence of an intoxicant, if he still possesses a mental capacity sufficient to form the intent requisite to the offense charged; or, if he has the intent present in his mind before he falls under the influence of the intoxicant and then commits the act, he will not be absolved of the responsibility for the act. Thus, intoxication is a defense only when it produces a mental disability such as will render the person incapable of forming the intent which is an element of the offense charged.

In considering the question of the defendant's intoxication, it should be considered along with all the other evidence in the case which bears on the question of intent which is explained in Instruction No. [8 in the instant case].

317, 318 (Iowa 1974). Also, the court frequently has noted that instructions must be viewed as a whole, not piecemeal. State v. Templeton, 258 N.W.2d 380, 383 (Iowa 1977); State v. Pelelo, 247 N.W.2d 221, 225 (Iowa 1977); State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974). In this case, Instruction No. 7 (the marshalling instruction) and Instruction No. 8 (regarding specific intent as an essential element of the crime), when viewed together with Instruction 12, served to instruct the jury that they were required to find defendant not guilty if evidence of his intoxication established a reasonable doubt concerning his capacity to form the specific intent to commit the theft. A requested instruction may be properly refused if the point raised is otherwise substantially covered. State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977); State v. Hall, 235 N.W.2d 702, 725 (Iowa 1975). We find that Instruction 12 alone, and additionally when considered with the other instructions given, correctly states the applicable law and that trial court did not err in refusing defendant's requested instruction or in giving Instruction 12.

Defendant contends that the trial court's refusal to give his requested instruction on pretrial publicity also constituted reversible error. As stated in Division II. of this opinion, defendant introduced no evidence, either during trial or during consideration of his Motion for Change of Venue, that any pretrial publicity resulted in prejudice to his case. The court must instruct the jury on the law applicable to the facts as supported by the evidence. State v. Fuhrmann, 261 N.W.2d 475, 479 (1978). The trial court did not err in refusing defendant's proposed instruction on this issue.

IV. Motion for New Trial

Defendant moved for a new trial on grounds previously discussed. We believe the discussions set forth in Divisions I. and III. of this opinion clearly explain why it was not error for the trial court to deny a new trial on grounds of denial of fair trial and improper instructions to the jury. Further, as per the discussion in Division II., we find statements made by Prosecutor Boerner do not represent prejudicial error to the defendant in this case. "It is not a prosecutor's misconduct which entitles defendant to a new trial; it is the prejudice which results therefrom and which prevents the trial from being a fair one." State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). Thus, we find trial court did not abuse its discretion and that defendant's motion for new trial was properly denied. See Fleener v. Board of Supervisors of Poweshiek County, 246 N.W.2d 335, 338 (1976). Judgment of the trial court is affirmed.

AFFIRMED.