IN THE COURT OF APPEALS OF IOWA

No. 0-007 / 08-2067
Filed March 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC EARL HOUK,
Defendant-Appellant.

Appeal from the Iowa District Court for Taylor County, Gary G. Kimes, Judge.

Defendant appeals from the judgment and sentence entered on his convictions of kidnapping, sexual abuse, and arson. **CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Douglas D. Hammerand, Assistant Attorney General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Defendant Eric Houk appeals from the judgment and sentence entered on his convictions following a jury trial to one count of first-degree kidnapping in violation of Iowa Code sections 710.1(3) and 710.2 (2007), three counts of third-degree sexual abuse in violation of sections 709.1(1), 709.4(1), 902.14(1)(b), and (c), and one count of second-degree arson in violation of sections 712.1(1) and 712.3. He was sentenced to life in prison without the possibility of parole on the kidnapping and sexual abuse convictions, and an indeterminate term of imprisonment not to exceed ten years on the arson conviction. Houk appeals.

I. Background Facts and Proceedings

On December 8, 2007, an eighteen-year-old female high school student, "M.F." left work at Hy-Vee around 9:00 p.m., and was not seen or heard from again until 6:00 a.m. the following morning. She testified that when she entered her car after work, a man she later identified as Houk was hiding in her back seat, grabbed her around the neck, held what she believed was a gun to her head, and ordered her to drive. Four or five miles outside of town, he ordered her to pull over and park on a gravel road. M.F. testified that he then proceeded to force her to undress, climb in the back seat, and have sexual intercourse with him both vaginally and anally. He eventually pushed her into the front passenger seat, where he then forced her to perform oral sex on him as he drove. He denied her requests to go home. M.F. testified that Houk then drove to his house, where he pushed her onto a bed, bound her hands and feet together with

duct tape, and covered her mouth. After leaving for a short while,[1] Houk returned and again forced her to have sexual intercourse both vaginally and anally. M.F. testified that all the facts she described were against her will.

After the police were alerted that M.F. was missing, they received a tip that a red pickup truck had been at the Hy-Vee parking lot around closing time. Learning this description matched the truck Houk had been driving, which belonged to his father, the police went to Houk's residence. The house was dark and no one answered the door. With additional indications that M.F. may be at Houk's residence, police returned shortly after 6:00 a.m. Eventually, Houk and M.F. emerged from the house. Houk was charged with kidnapping in the first degree, sexual abuse in the second degree, and arson in the second degree. He pleaded not guilty. In July 2008, Houk filed a motion to change venue, which after a hearing, the court overruled. In October 2008, a jury convicted Houk of kidnapping, sexual abuse, and arson. Houk filed a motion for a new trial, but the court found the jury's guilty verdicts were supported by substantial evidence and therefore Houk was not entitled to a new trial. Houk appeals.

II. Motion to Change Venue

Houk asserts the court erred in denying his motion to change venue. We review a denial of a motion for a change of venue de novo. *State v. Evans*, 671 N.W.2d 720, 726 (Iowa 2003). A trial court's decision rejecting a motion for

[1] M.F.'s car was discovered burning in a parking lot near Hy-Vee approximately two hours after M.F. disappeared. The police found

> the vehicle was intentionally set on fire by use of the Hawkeye Trader magazine which was spread throughout the vehicle as a trailer to spread the fire from one area to another and ignited most likely by an open flame from either a match or a lighter.

change of venue will not be overturned unless this court finds an abuse of discretion. *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989). Claiming a fair and impartial jury could not be secured locally, Houk filed a motion to change venue prior to trial. He asserted that due to numerous newspaper articles and television reports, M.F.'s popularity in the community, and the nature of the small town which evoked rumors of the incident, he would not receive a fair trial in Taylor County.

A court shall grant a change of venue where the defendant meets the burden of proof of showing the evidence demonstrates that "such degree of prejudice exists in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county . . . ." Iowa R. Crim. P. 2.11(10)(b); *Evans*, 671 N.W.2d at 726. In the absence of proof of actual jury prejudice, Houk must demonstrate that the publicity attending the trial is so pervasive that prejudice must be presumed. *Evans*, 671 N.W.2d at 726. The crucial determination is whether the jurors cannot impartially judge the issues to be determined at trial as a result of pretrial publicity. *Harris*, 436 N.W.2d at 367. Prejudice is not presumed based on some jurors' "mere exposure to news accounts." *State v. Newell*, 710 N.W.2d 6, 33 (Iowa 2006).

The pretrial publicity surrounding this case consisted of numerous newspaper articles, television broadcasts, and internet sources. There was extensive publicity, but most articles were published immediately after the crime, and nearly eight months prior to trial. The media reports appear to be largely factual in tone and voice no opinion as to Houk's guilt or innocence. Houk points

to no specific inaccuracies other than some variance in the eventual charges. *See State v. Wilson*, 406 N.W.2d 442, 445 (Iowa 1987). Houk further asserts that news articles and reader "blog" comments referencing these charges and his previous conviction for sexual abuse prejudiced him, but we find these references were insufficient to warrant a finding of presumed prejudice. *State v. Findling*, 456 N.W.2d 3, 6 (Iowa Ct. App. 1990) ("A community's knowledge of a defendant's prior criminal history does not entitle him to a change of venue.").

Upon our de novo review of the record, we find voir dire questioning was sufficiently conducted to weed out any pretrial prejudice on the part of any juror. We find the media coverage was not inflammatory, and agree with the district court that Houk "has failed to show a substantial likelihood a fair and impartial trial cannot be presented with a jury selected in Taylor County. There has been no showing of actual prejudice." The district court did not abuse its discretion in overruling the motion for change of venue.

III. Ineffective Assistance of Counsel

Houk asserts counsel was ineffective by failing to ensure his stipulation to prior convictions was knowing and voluntary. Ineffective assistance of counsel claims are reviewed de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Houk must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Houk contends the court did not perform a proper colloquy that directly informed him of the penal consequences of stipulating to prior convictions for

sentencing enhancement purposes. When a defendant is stipulating to a prior conviction for enhancement purposes, prior to sentencing, the court has a duty to conduct a further inquiry, similar to the colloquy required under Iowa Rule of Criminal Procedure 2.8(2); *see State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005), citing *State v. Brady*, 442 N.W.2d 57, 58 (Iowa 1989). While a defendant must be aware of the implications of his stipulation, a formal guilty plea colloquy under 2.8(2) is not required for him to stipulate to the facts of his prior convictions. *State v. McBride*, 625 N.W.2d 372, 374 (Iowa Ct. App. 2001).

During a pretrial conference, the prosecutor stated:

> if [Houk] is convicted of [the sexual abuse crimes], he will stipulate instead of the State having to do a bifurcated trial, our understanding is [Houk] will stipulate he has been previously convicted of sexual abuse in the third degree.

Counsel for Houk stated that he had discussed the stipulation with Houk, and Houk acquiesced and agreed. During trial, outside the presence of the jury, the court asked,

> Q: Mr. Houk, do you understand what we have just been discussing here today? A: Yes, I do.
> Q: You do have a recollection of either pleading guilty or being found guilty of the charges that have been dictated into the record. Is that correct? A: Correct.
> Q: That, in fact, was you? Is that correct? A: Yes.
> Q: You readily admit to pleading guilty or being found guilty of those charges? Is that correct? A: Yes.

Houk does not dispute his admissions, but asserts his counsel was ineffective for failing to object to the district court's failure to inform him of the "relevancy of his prior convictions," and "that his sentence could be extended to life in prison due to the enhancement." He claims he should have been informed of the

implications of his stipulation. *State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001).

While the record lacks any discussion Houk had with his counsel prior to his admission, and the district court did not make further inquiry or clarify the ramifications of Houk's admission, Houk cannot now claim prejudice, as his sentence would not be affected. In addition to the jury finding Houk guilty of three counts of sexual abuse in the third degree subject to enhanced punishment for prior convictions, Houk was found guilty of first degree kidnapping, a class "A" felony, with a life sentence imposed. Were we to now grant his request to vacate his habitual offender sentence and remand for resentencing, or preserve his claim for possible postconviction relief, the result of his sentence would not change. Counsel breached no duty upon which prejudice could be found.

IV. Motion for New Trial

Houk asserts, and the State agrees, that in denying his motion for a new trial, the district court applied the incorrect standard. In evaluating a motion for a new trial, the court must determine whether a new trial is appropriate based on the ground that the verdict of conviction is contrary to the "weight of the evidence." *See State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Following the guilty verdict, Houk moved for a new trial alleging the verdict was "contrary to the law or evidence." The court overruled the motion, citing the evidence was "substantial," but making no reference to the weight of the evidence.

Consequently, we conditionally affirm the judgment and sentence. We vacate the district court's ruling on Houk's motion for new trial and remand solely for the court to rule on Houk's motion on the basis of the existing record. If, after

having conducted a weight-of-the-evidence test, it again denies the motion, our affirmation of Houk's conviction shall stand. If the district court grants the motion, Houk's judgment and sentence shall be vacated, and a new trial shall be granted. We do not retain jurisdiction.

V. Pro Se Issues

Houk also raises a number of pro se issues, which are either not preserved for our review, subsumed in his appellate counsel's arguments, or otherwise without merit. On his claims of ineffective assistance of counsel, Houk failed to show his counsel did not perform an essential duty and that he suffered any prejudice.

CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.