IN THE COURT OF APPEALS OF IOWA

No. 6-415 / 05-0772
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ISAAC SALINAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy, Judge.

Isaac Salinas appeals his conviction and sentence for sexual abuse in the second degree in violation of Iowa Code section 709.3. **AFFIRMED.**

James Martin Davis, Omaha, Nebraska, and Dean Stowers, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Phil Havens, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

HUITINK, J.

I. Background Facts & Proceedings.

On the night of October 19, 2004, Isaac Salinas was with Jeff Senseman in the Wal-Mart parking lot. Brandi Adams arrived at the Wal-Mart parking lot around 11 p.m. She was not there to meet Salinas or Senseman, but to call her friend, Mitch, and buy cigarettes. As she walked from her car to the entrance of Wal-Mart, she heard her name called and turned around to see Salinas. Adams met Salinas in July 2004 and had seen him on approximately fifteen other occasions.

Salinas and Adams had a brief conversation, and Salinas accompanied her to the pay phone at the back of the store. Adams called her friend, Mitch, and discussed where she would meet him, but Salinas pulled the phone away from Adams and began talking on it before she and Mitch decided where to meet. Adams asked for the phone back, but Salinas had already hung up. Salinas told Adams that Mitch would meet her at Bel Air Beach. Adams did not know how to get to Bel Air Beach, and Salinas said that he and Senseman would show her where it was.

After purchasing cigarettes, Adams got in her Chevy Lumina, and Salinas talked to Senseman who was driving a Bronco. Salinas returned to Adams's car, got in, and instructed her to follow Senseman's Bronco. As they drove to the beach, Senseman played the stereo in the Bronco very loudly. Adams believed they arrived at Bel Air Beach around 11:30 p.m. Shortly after they arrived, Salinas and Senseman attacked Adams, attempted to force her to have oral sex, penetrated both her vagina and anus with their fingers, and slapped her. Salinas

sucked on the left part of Adams's neck and left a bruise. Adams was able to get away after she began to act like she was going to vomit.

As she drove back to town, Adams was pulled over by a deputy for speeding. The deputy noticed that she was extremely nervous. The deputy noticed the mark on the left side of her face just below the jaw line. Eventually, Adams told the deputy that she was attacked by two guys. She provided a description of the Bronco and what Salinas and Senseman were wearing. She was only able to tell the deputy Salinas's first name. The deputy recalled seeing the Bronco and Adams's Chevy Lumina about a half an hour earlier. He distinctly remembered seeing the Bronco because its stereo was so loud he heard the vehicle before he saw it.

The deputy called another officer and asked him to check the area around the lake where Adams had been. A pair of blue jeans and shoes were found at the beach. A billfold containing Senseman's driver's license, social security card, and voter registration card was inside the pocket of the jeans. Adams identified the license photograph as one of the men who attacked her. She identified the shoes and jeans as Senseman's. Adams accompanied the deputies to the beach where she was attacked to confirm that the jeans and shoes were found where she was attacked.

Adams had some marks on her neck and some abrasions on the palms of her hands. She also had red marks on her fingers where her rings dug into each finger when her hands were squeezed. Adams was examined by Dr. David Archer on October 20. Dr. Archer found bruises on the left side of Adams's neck, some bruising on both forearms and on her hands, with more bruising on the

right side than on the left side. The bruising on her wrists was consistent with someone having held her wrists. He observed a very small laceration between the opening of her vagina and her anus.

On October 20, Deputy Sheriff Don McClure went to Senseman's home. Senseman responded that he was framed because he could not find his pants or his billfold. Senseman admitted that he and Salinas had gone to Wal-Mart the night before. He claimed he and Salinas returned to his home and stayed there the rest of the night. Later during a taped interview with Deputy McClure, Senseman admitted that he and Salinas had seen Adams at Wal-Mart and that they had gone to the lake with her. Senseman said that Salinas and Adams began "making out" and that Salinas pushed up Adams's shirt and bra. Senseman testified that Adams offered to perform oral sex, but that he was unable to get an erection. Senseman acknowledged that he and Salinas both engaged in sexual acts with Adams, but that she consented. Swabs were taken from the fingers of Salinas and Senseman. The DNA profile of the swabs was consistent with the DNA profile of Adams.

On November 1, 2004, the State charged Salinas and Senseman with one count of sexual abuse in the second degree in violation of Iowa Code section 709.3(3) (2003). Trial began on January 24, 2005. Both Salinas and Senseman were tried together. After the jury was selected, proceedings were adjourned for three hours after an off-the-record conversation was held discussing the ethnic composition of the jury. After the court reconvened, Salinas challenged the jury panel and presented evidence in support of his challenge through the testimony of the Buena Vista County Clerk of Court. The trial court denied Salinas's

challenge to the jury panel. Salinas's attorney requested the record be left open to allow him to introduce census numbers for Buena Vista County. The court denied his request. After the presentation of the State's case, the State made a motion in limine challenging the testimony of defense witness, Ruth Davis. The court granted the motion in limine. Senseman made an offer of proof.

On January 25, 2005, Salinas filed a written challenge to the jury panel on the basis that there were no minorities on the panel. On January 28, 2005, the jury returned a verdict finding Salinas guilty of second-degree sexual abuse. Salinas was sentenced to a twenty-five year indeterminate term of imprisonment.

On appeal, Salinas raises the following issues:

I. Did the court err by overruling the defendant's objection to the jury pool composition, or by not providing the defendant with more time to prepare such a challenge?
II. Did the court err by sustaining the State's motion in limine, barring the testimony of a witness called by the defendant?

II. Standard of Review.

We review constitutional claims de novo. *State v. Robinson*, 618 N.W.2d 306, 311 (Iowa 2000).

III. Jury Panel Challenge.

"The Supreme Court has noted that the Sixth Amendment entitles a litigant to a jury panel designed to represent a fair cross section of the community." *State v. Watkins*, 463 N.W.2d 411, 414 (Iowa 1990) (citing *Holland v. Illinois*, 493 U.S. 474, 480, 110 S. Ct. 803, 805-06, 107 L. Ed. 2d 905, 914 (1990)). "A systematic exclusion of 'distinct' segments of the community violates this requirement." *Id*. (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 586-87 (Iowa 1979)).

A prima facie violation of the Sixth Amendment's fair cross-section requirement must first be established when challenging the composition of a jury panel. *Id*. 463 N.W.2d at 414 (citing *Duren*, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 586-87). Then "the State has the burden of justifying this infringement by showing that the attainment of a fair cross section would be incompatible with a significant state interest." *Id*. (citing *Duren*, 439 U.S. at 368, 99 S. Ct. at 670-71, 58 L. Ed. 2d at 589-90). To make a prima facie case the following must be shown:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. (citing *Duren*, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 586-87). In assessing a defendant's prima facie case, a court must consider all relevant circumstances. *Id*. (citing *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 1722-23, 90 L. Ed. 2d 69, 88 (1986)). "[T]here is no constitutional requirement that a class be represented in exact proportions to the general population." *Id*. (citing *Hoyt v. Florida*, 368 U.S. 57, 69, 82 S. Ct. 159, 166-67, 7 L. Ed. 2d 118, 126 (1961)). In other words, there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Holland*, 493 U.S. at 483, 110 S. Ct. at 808, 107 L. Ed. 2d at 918.

In showing that the jury venire is not fair and reasonable in relation to the number of such persons in the community, a defendant may use statistical

evidence to calculate the absolute disparity between the distinctive group reflected in the census and as reflected on the jury. *State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997). The disparity can be calculated by "taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." *Id*. (citing *United States v. Sanches-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989)). However, "[a] numerical disparity alone does not violate any of defendant's rights and thus will not support a challenge to the jury selection process utilized." *Id*. (citing *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993)). "Some deviation is to be expected." *State v. Jones*, 490 N.W.2d 787, 793 (Iowa 1992). "Only when this deviation becomes substantial is the fair cross-section requirement violated."[1] *Id*.

To make a showing of a systematic exclusion, the defendant "must show the exclusion is 'inherent in the particular jury-selection process.'" *Id*. (citing *Duren*, 439 U.S. at 366, 99 S. Ct. at 669, 58 L. Ed. 2d at 588). Our Iowa Supreme Court has held that the manner of jury venire selection set out in Iowa Code section 607A.22 is proper. *See Jones*, 490 N.W.2d at 794.

After the jury was selected and before the trial began, the court adjourned for three hours to allow Salinas to prepare evidence to challenge the jury composition. After court reconvened, Salinas presented testimony of the Buena Vista County Clerk of Court. Prospective jurors are selected from a combined list of registered voters and licensed drivers. The computer system selects the

[1] The Iowa Supreme Court has not found a substantial deviation between minorities in the county and the minorities in the jury venire. *See Thongvanh v. State*, 494 N.W.2d 679, 683 (Iowa 1993) (absolute disparity of .18% was not substantial); *State v. Huffaker*, 493 N.W.2d 832, 833 (Iowa 1992) (2.85% absolute disparity is not a substantial deviation); *Jones*, 490 N.W.2d at 792 (deviation of 1.5% is not a substantial disparity).

names for the jury venire. The clerk of court could not explain how the computer selects the names of jurors. She testified that of the 200 people selected, approximately twenty-five percent of the people cannot be located. In most situations they have moved and did not leave a forwarding address.

After hearing this evidence, the trial court stated the following:

> When considering the defendant's attempt to make the showing, the court has to rely upon testimony or other forms of evidence to support the defendant's motion. In this case the only evidence offered was the testimony of the clerk of court, who set forth the procedure used in drawing jurors for this jury panel. The defendant asks the court to take judicial notice of the ethnic background of people in Storm Lake or Buena Vista County to make, supposedly a determination that the representation of Hispanic people on the jury panels is not fair. Without some supporting evidence, I don't believe that I can take judicial notice of the makeup of the community to determine whether or not any or all of those people, the people of the minority group, are eligible to be jurors under the statutory requirements. In order to meet the burden of proof, I find that the defendant would have to offer evidence that would set forth the percentage of the population in Buena Vista County within the alleged minority group as compared to the percentage of population of other prospective jurors in the county. As far as the evidence goes in this case, other than the statements of counsel, defendant has not established by – by the evidence what ethnic group he is a member of.

The trial court concluded by stating that the "defendant has failed to show by a preponderance of the evidence that if there is an underrepresentation of a particular ethnic group, that the underrepresentation is due to systematic exclusion of the group in the jury selection process." Salinas then requested that the record be left open to allow him to introduce certified copies of census records. The court denied Salinas's request.

We agree with the trial court. The evidence presented did not establish Salinas's ethnic background. Additionally, nothing in the testimony of the clerk of

court indicated that the representation of Hispanics in venires from which the jury was selected is not fair and reasonable in relation to the number of Hispanics in the community. No evidence was presented regarding the number of Hispanics in the community. Additionally, the process used complies with the requirements of Iowa Code section 607A.22 which was held to be proper.

Salinas argues that he should have been given more time to collect and present evidence regarding the representation of Hispanics in the venires. Iowa Rule of Civil Procedure 1.911(*a*) provides that "[a] continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained." This rule of civil procedure is "applicable to criminal cases." *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa 1995). "A ruling denying a motion for a continuance is discretionary and calls for reversal only upon a showing of abuse of discretion." *Id*. "A motion for continuance shall not be granted except upon a showing of good and compelling cause." Iowa R. Crim. P. 2.9(2).

"Trial court judges are called upon to do justice to those needing and deserving a continuance, while at the same time resolutely moving the trial assignment toward the speedy resolution of cases." *LeGrange*, 541 N.W.2d at 564. A trial court judge must determine whether a motion for continuance "stems from a legitimate need, or from a wish to delay." *Id*. "Many trial continuances are sought on legitimate grounds" and "[i]n spite of careful plans and diligent preparations, an unanticipated event will on occasion necessarily precipitate a continuance motion." *Id*.

Here, the trial court denied Salinas's request for more time to present evidence regarding the representation of Hispanics in the population. We agree with the trial court's ruling. Despite Salinas's argument that he was not given enough time to produce evidence, a continuance was granted enabling Salinas to arrange for the testimony of the clerk of court. However, her testimony was his only evidence. He did not secure census data during the continuance. Even assuming the continuance had been granted, the Iowa Supreme Court has determined that the manner of jury venire selection set out in Iowa Code section 607A.22 is proper. *See Jones,* 490 N.W.2d at 794. The process used by the clerk of court complies with the requirements of section 607A.22, because it uses the current list of registered voters and licensed drivers. Additionally, the lists are updated quarterly according to the testimony of the clerk of court. Therefore, Salinas could not show a systematic exclusion of Hispanics in the jury selection process. Accordingly, the trial court did not abuse its discretion in denying Salinas's request for more time.

IV. Motion in Limine.

The trial court excluded testimony of defense witness Ruth Davis for failure to lay proper foundation. We review rulings on general evidentiary issues for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). Through an offer of proof by Senseman, it was apparent Ruth Davis was allegedly going to testify that she called Adams and Adams informed her that Senseman had nothing to do with her attack. Salinas argues the evidence is substantive and could also be considered as extrinsic evidence of a prior inconsistent statement by Adams offered to show credibility of Adams.

The admission of Davis's testimony is controlled by Iowa Rule of Evidence 5.613(*b*), because Senseman sought to call Davis to impeach Adams's credibility with alleged prior out-of-court statements. Rule 5.613(*b*) states, in relevant part, as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

The record shows that Adams was never questioned about any conversation she had with Davis. She was never given the opportunity to explain or deny the alleged prior inconsistent statements. Salinas did not make any argument as to why the court should apply the "justice otherwise requires" exception. Accordingly, we agree with the trial court's determination that Salinas did not meet the foundational requirements of rule 5.613.

AFFIRMED.