IN THE COURT OF APPEALS OF IOWA

No. 1999-340 (9-593) / 98-1631
Filed January 26, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAWN GRAHAM,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Edward B. DeSilva, Judge.

On appeal from his convictions for second-degree attempted burglary and assault on a police officer, defendant contends: (1) the court erred in answering questions posed by jurors during deliberations rather than referring them back to the original instructions; (2) the court abused its discretion in overruling his objection based on the State's violation of his right to remain silent; (3) the evidence was insufficient to convict him of second-degree attempted burglary; and (4) his counsel was ineffective in failing to raise a challenge to the State's use of juror strikes. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County Attorney, for appellee.

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

MILLER, J.

Defendant Shawn Graham appeals his conviction, following jury trial, of attempted burglary in the second degree. We affirm.

From the evidence presented at trial, the jury could find certain facts. David Calhoun was a long-time probation and parole officer, and had been Graham's brother's supervising parole officer. Graham's mother lived in the same neighborhood as Calhoun. Calhoun had known Graham for many years, had befriended him, and had on numerous occasions given Graham money when he needed it. Graham had been to Calhoun's residence on numerous occasions. Prior to the April 2, 1998 incident which is involved in this case, their most recent contact had been January 23, 1998, when Graham phoned, wanting money, but Calhoun declined. Their last contact before that date had been about mid-summer of 1997.

Calhoun's residence had double patio doors at the rear, each of which had two locks. One was a double-key deadbolt, which requires a key to open from either side. The other was a single-key deadbolt, which required a key to open from the outside but could be opened by a turn handle from the inside. On the east side of the house was a basement window, which had panes of glass and metal bars. The front of the house had a lockable storm door and an inside door with three locks, one of which could be opened only with a key. The latch on the storm door handle had been broken, and the door was secured by a hook latch.

At about 9:30 p.m. on April 2, 1998, Graham went to Calhoun's house, wanting to get money. Calhoun was asleep. Graham broke windowpanes on the rear patio doors, near the door locks. This allowed access to the door locks that

could be opened by turning the handles. Graham broke the panes of glass out of the east side basement window. Graham broke the front storm door latch mechanism.

Calhoun was awakened by noise, dialed 9-1-1, and reported that someone was trying to break into his house. When police officer Thoeming arrived he saw Graham on the front "porch" of Calhoun's residence, with the outside door opened and Graham's hand on the door knob of the inside door. It appeared to the officer that Graham was trying to turn the doorknob to open the door. When Officer Thoeming identified himself as a police officer, Graham began to approach him. After Officer Thoeming asked Graham to stop, Graham ran away. Thoeming lost Graham in the foot chase. Other law enforcement officers apprehended Graham, who attempted to hide by putting his head in a doghouse. Later, in the jail, Graham spit on two officers, resulting in two charges of assault of a police officer. He does not appeal his convictions of the two assaults. In addressing Graham's claims, we note additional facts which the jury could have found from the evidence.

Graham appeals his conviction of attempted burglary in the second degree. He claims he trial court (1) erred by answering two jury questions during deliberations; (2) abused its discretion in overruling his objection to a question by the prosecutor; and (3) erred in overruling his motion for judgment of acquittal and motion for a new trial. Further, Graham argues trial counsel was ineffective if he did not preserve any of these issues for our review. Finally, Graham asks us to preserve for postconviction relief what he characterizes as a "*Batson* challenge" to the State's use of juror strikes.

I. Supplemental Jury Instructions

Generally, challenges to jury instructions are reviewed for corrections of errors of law. Iowa R. App. P. (4); *see State v. Walker*, 600 N.W.2d 606, 608 (Iowa 1999). However, when a jury makes inquiry during deliberations, the trial court has discretion in determining whether to provide further instructions or otherwise respond. Iowa R. Crim. P. 18(5)(g); *State v. Griffin*, 323 N.W.2d 198, 200-01 (Iowa 1982). Accordingly, we review the trial court's decision concerning whether and how to respond for abuse of discretion, and the content of any response for corrections of errors at law.

During jury deliberations the jury submitted the following two questions to the court:

> 1. In order for the suspect to be guilty of 2nd degree attempted burglary does he have to enter the interior of the house?
>
> 2. Could most of his body be outside of the house and his hand inside the house and this be considered 2nd degree burglary?

The court answered the first question "no" and the second question "yes."

Rule 18(5)(g) of the Iowa Rules of Criminal Procedure states the trial court may, in its discretion, inform the jury on a point of law when requested by the jury during its deliberations. Iowa R. Crim. P. 18(5)(g). Therefore, "[a]ccording to the rule generally accepted, the court may, at the request of the jury, give further instructions, since the interest of justice requires that the jury have a full understanding of the case." *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). In fact, it is the court's duty to give the additional instruction where the jury expresses confusion or a lack of understanding of a significant element of applicable law. *See id.* Failure to do so may constitute reversible error. *Id.*

Graham argues the trial court erred because its answers to the jury questions gave undue prominence to the fact Graham's body may have penetrated the inside of one of the broken window panes. *See State v. Johnson*, 534 N.W.2d 118, 124 (Iowa App. 1995) ("[t]he instructions should state the applicable rule of law, and are not intended to marshal the evidence or give undue prominence to certain evidence involved in the case."). Graham further argues the court's answer verified the fact his body had done so.

The jury's questions raised points of law and demonstrate uncertainty or confusion on the part of the jury concerning those legal points. Contrary to Graham's arguments, the court's answers to those questions merely answered points of law raised by the questions. The answers did not marshal evidence, give prominence to any evidence, or even refer to any evidence. They did not state, suggest or imply any fact or facts. Graham makes no claim that the answers incorrectly state the law.

Although attempted burglary was being submitted on a "breaking" rather than "entering" theory, several sources of the jury's uncertainty or confusion are apparent. During cross-examination of both Officer Thoeming and of Calhoun, Graham's attorney had asked if it was not true that Graham had not gained entry to the house. Further, a jury instruction on the lesser-included offense of criminal trespass required that entry be made on the property of another. The trial court did not abuse its discretion in deciding to provide substantive responses to the questions instead of just referring the jury to previously given instructions as proposed by Graham. No legal error in the answers is claimed or shown.

II. Testimony relating to Graham's Post-Arrest Silence

Objections to evidence must be sufficiently specific to inform the trial court of the basis for objecting. *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982). We pass our serious concerns as to whether Graham's very vague, broad and general objection concerning "constitutional rights" was sufficiently specific to inform the trial court of the basis for objecting, and address the merits of the issue presented.

We review alleged constitutional violations de novo. *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999). On cross-examination, defense counsel asked the following questions of Officer Thoeming:

> Q: . . . Did you try to talk to him, interrogate him, or say anything to him? A. I did not interrogate Shawn, no. Q: Who interrogated him? A: I believe Detective Morgan. I'm not sure. Q: As you were transporting him, he was very nasty with his language. Did he tell you he was there to burglarize the house or simply to wake up Mr. Calhoun? A: He didn't say whether he was there to rob or wake up Mr. Calhoun.

On redirect, the following line of questioning took place between the prosecutor and Officer Thoeming:

> Q: When you advised the defendant of [the charges], did he ever deny attempting to break into the residence of Dave Calhoun? A: No. [Defense Counsel]: I'm going to– Q: Did he–. [Defense Counsel]: I'm going to object. I think that goes beyond the scope of cross, and also I don't think it's a proper question for cross-examination and she's asking the officer to comment on what his impression is on my client's exercise of his constitutional rights. . . . The Court: I will allow him to answer the question....

On re-cross examination, defense counsel asked, "[h]e didn't say anything, did he?" Officer Thoeming replied, "[o]ther than the threats and derogatory names, no."

A prosecutor's use of a defendant's post-arrest, post-Miranda warning silence violates the defendant's right to remain silent as guaranteed by the Fifth and

Fourteenth Amendments to the United States Constitution. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976). The right of an accused to remain silent without fear of being chided at trial for doing so is clearly a fundamental right. *State v. Porter*, 283 N.W.2d 351, 352-53 (Iowa 1979) (citation omitted). Because a fundamental right is involved, the error can be harmless only if it is shown to be harmless beyond a reasonable doubt. *State v. Nelson*, 234 N.W.2d 368, 372 (Iowa 1975). However, no error can be found where a party to a criminal proceeding complains of error with respect to the admission or exclusion of evidence where he himself has acquiesced in, committed, or invited the error. *State v. Hinkle*, 229 N.W.2d 744, 750 (Iowa 1975).

In this case, Graham invited and indeed committed the error, and now cannot complain. The defendant during cross-examination asked the officer what Graham did or not say. The State then followed that up on redirect examination by asking whether Graham denied attempting to break into the house. On re-cross examination, defense counsel asked straightforwardly whether Graham said anything, other than threats and derogatory names. To each question, the officer answered "no." Once the defense asked what explanations, if any, Graham gave after arrest and the *Miranda* warnings, the district court was well within its discretion in allowing the State to also pursue this topic. *See State v. Williams*, 427 N.W.2d 469, 472 (Iowa 1988) (holding once the defendant has introduced inadmissible evidence, the trial court has discretion whether to allow the state to offer otherwise inadmissible evidence on the same subject when it is fairly responsive).

III. Sufficiency of the Evidence

Graham's next claim is the trial court erred in overruling his motions for judgment of acquittal and for new trial. The court may grant a new trial when the jury's verdict is contrary to law or evidence. Iowa R. Crim. P. 23(2)(b)(6). A motion for judgment of acquittal is to be granted whenever "the evidence is insufficient to sustain a conviction" for the charged offense. Iowa R. Crim. P. 18(8)(a); *State v. Geier*, 484 N.W.2d 164, 170 (Iowa 1992). The Iowa Supreme Court, in discussing the different standards in reviewing a motion for a new trial and a motion for judgment of acquittal, quoted with approval Charles Wright:

> On a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.
>
> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.
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> ... The motion [for new trial] is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

State v. Ellis, 578 N.W.2d 655, 658-59 (Iowa 1998) (quoting 3 Charles A. Wright, *Federal Practice and Procedure* § 553, at 245-48 (2d ed.1982)). Because the standard for reviewing a motion for a new trial is more stringent than that for reviewing a motion for judgment of acquittal, we will discuss Graham's claim in terms of a "contrary to the weight of the evidence" standard. *See Ellis*, 578 N.W.2d at 658-59. We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *See id.* at 659.

To convict Graham of attempted burglary in the second degree as charged in this case, the State had to prove that he attempted to break into an occupied structure with the specific intent to commit an assault or theft. Iowa Code § 713.2 (1997). Graham argues the State did not prove he had the ability to form the requisite specific intent because he was intoxicated.

It has long been the general rule in Iowa that, although voluntary intoxication cannot constitute a defense to a crime, it may negate criminal intent if such intent is an element of the crime charged. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986) (citation omitted).

The State presented evidence from which the jury could find that Graham, contrary to his testimony, was not drunk. Officer Thoeming testified that at the time he was in contact with Graham, he did not notice any signs of intoxication. Two other officers who came into close contact with Graham that evening testified they also did not notice any signs of intoxication. Further, Graham could recall with detail the events of that evening. Therefore, even though Graham presented evidence from which the jury could have found he was intoxicated, the jury's verdict to the contrary was not contrary to the weight of the evidence.

Graham also argues that, aside from his diminished responsibility defense, the State failed to prove he intended to commit a theft or an assault. While the State presented no direct evidence as to Graham's specific intent, direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crime. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992).

"[T]he element of intent in burglary is seldom susceptible to proof by direct evidence." *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). Usually proof of intent will depend upon circumstantial evidence and inferences drawn from such evidence. *Id.* A jury may infer intent to commit a theft or assault from the circumstances of the defendant's entry into the premises and his acts preceding and following entry. *See id.* Logically, a jury may also infer such intent from the circumstances of a defendant's breaking barriers to entry and his acts preceding and following the breaking. The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not the inference of intent is true. *Id.*

Graham argues his intent was solely to damage the victim's property, not to commit a theft or an assault. However, the State presented evidence from which the jury could find from the circumstances surrounding the crime that Graham did intend to commit a theft or an assault. Officer Thoeming testified that upon his arrival, it appeared that Graham was attempting to open the interior front door of Calhoun's house. Most of the damage done to the victim's house was done by breaking glass in areas that would allow someone to enter the house if locks inside the glass could be unlocked. One door was unlocked near where damage occurred, although the victim testified that the door had been locked before the incident. It is clear from the testimony that when Graham went to Calhoun's house, he intended to get money from him. It is also clear from Graham's own testimony that when Calhoun didn't respond to Graham's banging on doors and yelling, Graham became "very mad" at Calhoun. It was not against the weight of the evidence for the jury to conclude from the time, nature, surrounding circumstances, and method of attempting to break into Calhoun's home that Graham attempted to

break into it to steal some money or other valuables in order to get alcohol or other drugs or to assault Calhoun for not responding.

Because the verdict was not contrary to the weight of the evidence, the court did not abuse its discretion in overruling Graham's motion for a new trial. Further, the court did not err in finding sufficient evidence to support the verdict and thus overruling Graham's motion for judgment of acquittal. This is because "[i]nsufficiency of the evidence to support a conviction means 'that the government's case was so lacking that it should not have been *submitted* to the jury.'" *Ellis*, 578 N.W.2d at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2217, 72 L. Ed. 2d 652, 660 (1982)) (emphasis in original). Having found that the verdict was not contrary to the weight of the evidence, it follows that the case was submissible to the jury, and therefore there was sufficient evidence to "convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt," after "consider[ing] all the evidence" and "view[ing] the evidence in a light most favorable to the State." *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1980) (citations omitted).

IV. Preservation of "*Baston* Challenge" for Postconviction Relief Proceedings

Graham asks us to preserve for postconviction relief proceedings what he characterizes as a "*Batson* challenge." He urges that if he issue has not been properly preserved, such failure constitutes ineffective assistance of counsel. The record contains the following information regarding Graham's complaint:

> THE COURT: And I should say also for the record, Mr. Schwartz (defense counsel) made a statement at the close of the jury selection asking that the jury be--selection of Ms. Raines in striking the two

> black people and the young people from the jury require the court to swear another panel and proceed. Accordingly, the Court does not feel that there have been grounds raised to require this, and the motion is denied, but this was a motion made by Mr. Schwartz.

In *Batson* the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prevents a prosecutor from using peremptory challenges to strike potential jurors "solely on account of their race." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986). Under *Batson* and the Iowa Supreme Court's decisions in *State v. Veal*, 564 N.W.2d 797 (Iowa 1997), *State v. Knox*, 464 N.W.2d 445 (Iowa 1990), and *State v. Watkins*, 463 N.W.2d 411 (Iowa 1990), a defendant must first establish a prima facie case of purposeful discrimination in selection of the jury panel. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1722-23, 90 L. Ed. 2d at 87; *Knox*, 464 N.W.2d at 448. "To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87 (citation omitted). Five years after *Batson*, the United States Supreme Court held that a white defendant has standing to challenge the removal of black venire persons, but cautioned that "[t]he emphasis in *Batson* on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's *standing* to object to the discriminatory use of peremptory challenges." *Powers v. Ohio*, 499

U.S. 400, 416, 111 S. Ct. 1364, 1373, 113 L. Ed. 2d 411, 429 (1991) (emphasis added).[1]

"In determining whether a defendant has established the requisite showing of purposeful discrimination, the court should consider all relevant circumstances including, but not limited to, a pattern of strikes against black jurors, as well as the prosecutor's questions and statements during voir dire." *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997) (quoting *Knox*, 464 N.W.2d at 448).

A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87. The defendant did so here by showing the prosecutor struck "the two black people."

Once this prima facie case of purposeful discrimination is made, an inference arises that the government violated the defendant's equal protection rights and "the State has the burden of articulating a clear and reasonably specific" race-neutral explanation for the peremptory strike. *Griffin*, 564 N.W.2d at 375.

> [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.

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[1]This point is important as the defendant is Caucasian, and challenges the removal of black venire persons.

Batson, 476 U.S. at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88 (citations omitted). The race-neutral explanation must be "related to the particular case to be tried." *Id.* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88.

Because the defendant established a prima facie case of purposeful discrimination but no further steps were taken by the State or the court to make a record, including adequate factual findings, and resolve the claim, we find the issue has been preserved but the record is inadequate to determine how it should have been resolved. We preserve the claim for possible postconviction proceedings. *See Saddiq v. Iowa*, 387 N.W.2d 315, 329 (Iowa 1986) (remanding challenge to removal of black venire persons to postconviction trial court for determination under the newly announced rule of *Batson* of whether prosecutor purposely discriminated in striking black persons from the jury venire); *cf. State v. Watkins*, 463 N.W.2d 411, 415 (Iowa 1990) (holding the appropriate remedy for a Sixth Amendment challenge to the composition of the jury venire is to affirm on condition and remand for an evidentiary hearing).

AFFIRMED.

SACKETT, C.J. (partially concurs and dissents)

I concur with the majority in all respects except I would not preserve the alleged *Batson* claim for postconviction proceeding.