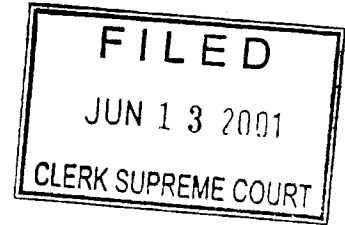


IN THE COURT OF APPEALS OF IOWA

No. 1-344 / 00-941  
Filed June 13, 2001



STATE OF IOWA,  
Plaintiff-Appellee,

vs.

ALBERT BENNY WHITESIDE,  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,  
Judge.

Defendant appeals from his conviction for third-degree sexual abuse and  
first-degree kidnapping. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney  
General, William E. Davis, County Attorney, and Julie Walton, Assistant County  
Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

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**ZIMMER, J.**

Defendant, Albert Whiteside, appeals from his conviction for third-degree sexual abuse and first-degree kidnapping. He contends he was denied his constitutional right to equal protection when the prosecution failed to provide race neutral reasons for striking an African American member of the jury panel. He also asserts the court erred in allowing the admission of prior bad acts evidence. We affirm.

***I. Background Facts and Proceedings.*** On the evening of July 23, 1999, Tammie Spreights was at a friend's apartment. Whiteside, who Spreights had met once before, was also at the apartment. Around midnight, Spreights decided to walk to a convenience store to purchase cigarettes. The defendant offered to give her a ride to the store and she accepted. Rather than driving her to the store, he drove to a secluded parking lot by the Mississippi River. The defendant told Spreights he wanted to get high, but she declined. He then pulled a knife out of a toolbox on the floor of his truck and ordered her to take off her shoes, pants and underwear. She complied, fearing she would be hurt if she did not.

The defendant then had vaginal intercourse twice with Spreights while the knife was in view on the dashboard. He also forced her to perform oral sex on him and he performed oral sex on her. In a failed attempt to escape, Spreights feigned an asthma attack and requested to return to the apartment to get her inhaler. Spreights and the defendant spent several hours in the truck until he took her to a convenience store to purchase cigarettes. When they reached the store, she jumped out of the truck, ran inside and called the police. A Davenport

Police Officer was dispatched to the store. When she arrived, she found Spreights crying and with her shorts unzipped.

Based on this incident, the State charged the defendant with second-degree sexual abuse and first-degree kidnapping. During jury selection, the assistant county attorney informed the trial court of her intention to exercise a peremptory strike on one of three African American jurors who were part of the panel of prospective jurors that had been passed for cause. The prosecutor based her strike on the concern that the juror would use this case as a "soapbox" to educate other jurors about what he perceived were inequalities in the justice system rather than basing his deliberations on the evidence presented at trial. The defendant resisted, arguing that the State failed to provide a race-neutral reason for striking the juror. The trial court concluded the reasons offered by the prosecutor were race-neutral.

Later, during trial, the State called Sheila Bowsky as a witness. Over the defendant's objection, the trial court permitted her to testify that in 1998 the defendant had taken her to a deserted area under the pretense of sharing crack cocaine, but instead he attempted to sexually assault her. Following the trial, the jury found the defendant guilty of the lesser-included offense of third-degree sexual abuse, in violation of Iowa Code section 709.4 (1999), and first-degree kidnapping, in violation of section 710.2.

The defendant appeals. He contends he was denied his constitutional right to equal protection when the prosecution failed to provide race neutral reasons for striking prospective juror William Woods, an African American, from

the jury panel. He also asserts the court erred in allowing the admission of prior bad acts evidence from Bowsky.

**II. Peremptory Challenge.** Whiteside, who is African American<sup>1</sup>, argues that his right to equal protection of the law under both the United States Constitution and Iowa Constitution was denied by the prosecutor's peremptory strike used to remove Woods from the jury panel. Our review of this claim is de novo. *State v. Veal*, 564 N.W.2d 797, 806 (Iowa 1997).

In evaluating a claim that a prosecutor has used a peremptory challenge in a manner that violates a defendant's right to equal protection of the law, the court has devised a three-step process. *Hernandez v. New York*, 500 U.S. 352, 358, 111 S. Ct. 1859, 1865, 114 L. Ed. 2d 395, 405 (1991). First, a defendant must make a prima facie showing that the prosecutor used the peremptory challenge on the basis of race. *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990). Such a showing may be found by examining whether a prosecutor has engaged in a pattern of strikes against African American jurors, as well as the prosecutor's questions and statements made during voir dire. *Id.* Once a defendant has made out a prima facie case of purposeful discrimination, an inference is raised that the government violated the defendant's equal protection rights. *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997). The second step shifts the burden to the State to articulate a clear and reasonably specific race-neutral reason for exercising the strike. *Id.* The final step requires the trial court to determine whether the defendant has carried his burden of proving purposeful

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<sup>1</sup> The record reveals that the victim, Tammy Spreights, is also an African American.

discrimination. *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1866, 114 L. Ed. 2d at 405.

We first address the State's contention that this Court need not reach the second step of the analysis because the defendant failed to preserve the record by making a prima facie case of purposeful discrimination. As the defendant notes, it was the prosecutor who initiated consideration of this issue and offered her reasons for exercising the peremptory challenge.

Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

*Id.* Therefore, we find the defendant has preserved this issue for review.

Whiteside claims the prosecution failed to provide a race-neutral reason for striking Woods from the jury panel. At the hearing, the prosecutor explained that she was using a peremptory challenge to strike Woods, who she described as an otherwise "wonderful juror," because he was "overly concerned with big issues involved in the criminal justice system." The prosecutor feared these concerns would deter Woods from being able to independently weigh the evidence in the case. She explained her concern that Woods would use the case as a soapbox to educate the other jurors about inequalities in the justice system, rather than basing his deliberations on the evidence presented at trial.

Whiteside points out that Woods did not state that he could not be fair or that he could not follow and apply the law. However, "[t]he prosecutor's explanation need not rise to the level justifying an exercise of challenge for cause." *Griffin*, 564 N.W.2d at 375 (citation omitted). In fact, the second step of

the analysis does not even require that a prosecutor's explanation be persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995). Instead, the explanation must simply be based on something other than the race of the juror. *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*

We find that the prosecutor's proffered reason for striking Woods from the panel was race neutral on its face and satisfies the step two burden of articulating a nondiscriminatory reason for the strike. As explained by the prosecutor, her challenge did not rest on the intention to exclude African Americans from the jury. Her basis for the challenge was that this particular prospective juror's views about the criminal justice system in general might interfere with his ability to independently weigh the evidence presented in this particular case. Concerns of this nature are not unique to African Americans. While this criterion for removal might result in the disproportionate removal of prospective African American jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the defendant's right to equal protection. See *id.* at 361, 111 S. Ct. at 1867, 114 L. Ed. 2d at 407.

At the third step of the analysis, the persuasiveness of the prosecutor's justification becomes relevant. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839. At this step, the trial court determines whether the State has carried its burden in proving purposeful discrimination. *Id.* Implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. *Id.* Because there will seldom be much evidence bearing on this issue, the best

evidence will often be the demeanor of the prosecutor. *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869, 114 L. Ed. 2d at 409. Evaluation of a prosecutor's state of mind based on demeanor and credibility lies within the province of the trial court. *Id.* Therefore, the trial court's decision in this regard is accorded a great deference on appeal. *Veal*, 564 N.W.2d at 807.

In the case at hand, the district court believed the prosecution's race-neutral reasons for striking Woods. We are hindered in our review of the record because voir dire was not reported. However, during the reported hearing following voir dire of the jury panel, the trial court confirmed the prosecutor's concerns that Woods was too distracted by outside issues when it stated, "Well, he certainly gave every indication of that when every time he was asked a direct question, he didn't even start out by answering the question, he would go off into a global argument." The district court had the opportunity to observe the prosecutor and found her reasons credible. This finding is bolstered by the fact that she did not attempt to strike either of the other two African Americans from the jury panel. Therefore, we affirm the district court's findings that the State articulated a credible race-neutral reason in using its peremptory strike against Woods.

**III. Prior Bad Acts.** Whiteside next argues the district court erred in allowing testimony regarding prior bad acts. He argues Bowsky's testimony was not relevant, and if relevant, its probative value was substantially outweighed by unfair prejudice and, therefore, it was not admissible under Iowa Rules of evidence 403 and 404(b).

This court reviews evidentiary issues for an abuse of discretion. *State v. Query*, 594 N.W.2d 438, 443 (Iowa Ct. App. 1999). Such abuse occurs only where the trial court “exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.” *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (quoting *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994)). If an abuse of discretion is found, we will only reverse if the abuse is prejudicial. *Greene*, 592 N.W.2d at 27.

The court employs a two-step analysis in determining whether evidence of prior bad acts is admissible. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001). First, the evidence must be relevant. *Id.* If it is not, it is inadmissible. *Id.* If the evidence is relevant, the court then looks to see if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* If the probative value of the evidence is outweighed, it does not matter to what extent the evidence is relevant; it will be inadmissible. *Id.*

We find the testimony regarding Whiteside's prior sexual assault was relevant in this trial. While evidence of other crimes is not admissible to prove the character of the defendant or to show he acted in conformity therewith, such evidence is admissible for other purposes. Iowa R. Evid. 404(b). For example, such evidence is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* The State offered Bowsky's testimony to rebut Whiteside's contention that he and the victim engaged in consensual sex, as well as to show his plan and motive in committing the sexual abuse. This court has held such evidence is relevant in a sexual abuse trial when the prior assault is sufficiently similar to the crime for which the

defendant is being tried. See *State v. Howell*, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996).

Where prior sexual conduct tends to show the same peculiar and characteristic pattern as in the crime charged, such conduct makes it more probable that the victim is telling the truth. *State v. Plaster*, 424 N.W.2d 226, 230 (Iowa 1988). Here, the trial court found significant similarities between the defendant's attack on Bowsky and his abuse of Spreights. The record supports this conclusion. In each situation, Whiteside deceived an acquaintance into going to a secluded area late at night. Once his intended victims were isolated from others, he offered them drugs, demanded sex, and then assaulted them. Eventually, he let each victim go and later returned to the same neighborhood. We do not find the trial court abused its discretion in finding Bowsky's testimony was relevant.

We also do not find the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Whiteside. Spreights was the only witness to the assault. See *Howell*, 557 N.W.2d at 912. The probative value of Bowsky's testimony was strong. The State submitted clear proof to the district court that Whiteside committed the prior bad act by providing the court with a transcript of the sentencing hearing in Minnesota in which Whiteside admitted the allegations contained in police reports concerning the incident with Bowsky. Therefore, it is clear that the assault occurred and that Whiteside was the actor. Finally, the district court instructed the jury to consider the evidence only for the purpose of establishing intent or lack of consent. See *id.*

Because the testimony of Bowsky was relevant and its probative value was not outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting the prior bad acts testimony.

**AFFIRMED.**