IN THE COURT OF APPEALS OF IOWA

No. 1-179 / 00-831
Filed July 18, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES KEITH JAMES, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of first-degree murder. **AFFIRMED.**

Michael J. Burdette of McEnroe, McCarthy & Gotsdiner, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Vooght, Assistant County Attorney, for appellee.

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

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ZIMMER, J.

Charles James, Jr., appeals from the judgment and sentence entered following his conviction of first-degree murder in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (1999). He contends the district court erred in denying his request to sever his trial from his codefendant, by admitting evidence of gang activity and evidence of an incident of terrorism unrelated to the crime for which he was charged, and by overruling his motion for judgment of acquittal on grounds the evidence was insufficient to support a finding of guilt. James also contends his trial counsel rendered ineffective assistance. We affirm.

I. Background Facts and Proceedings. Defendant and his cousin, Lance Dixon, were charged with first-degree murder for the shooting death of Cedric Johnson. Johnson was shot through the door in the kitchen of his house from outside the home. James and Dixon were tried together.

At trial, Marie Van Dyke testified that she drove James and Dixon to Johnson's home late in the evening on November 10, 1999. She testified both men got out of the car and returned after she heard shots fired. Van Dyke then drove the men to a bridge where she observed both men throw guns into the river. Ballistics evidence indicated two guns were involved in the shooting. Van Dyke further testified that as she drove the men to the river, James exclaimed, "I got me one. I wanted to get both. I know I got one of them." He also stated he shot the man in the chest. An autopsy revealed Johnson died from a gunshot wound to the chest.

Ten-year-old Richard Lewis was in Johnson's home at the time of the shooting. He testified that he looked out the window and saw James and Dixon

standing in the yard. He testified that he saw James with a gun. He later identified James from a photographic array.

Charlie Smith, who has a son with James's father, testified she received a phone call from James in which he sounded upset. James requested that Smith pick him up at his girlfriend's home. When he was in Smith's car, Smith asked James if he shot Johnson. Smith testified that he answered affirmatively.

The victim's fiancé, Nicole Sanders, testified that several hours before Johnson was shot, a person she later identified as James came to the residence she occupied with Johnson and asked to see "Boogie." Cedric Johnson was also known as "Boogie." Sanders testified Johnson told James to leave the home because Johnson did not know him.

The jury found James guilty of first-degree murder. He was sentenced to life imprisonment. James appeals, alleging the district court erred by denying his request to sever his trial from Dixon's and by allowing testimony about gang activity and an incident of terrorism. He also contends that the evidence was insufficient to support his conviction and the district court erred in denying his motion for judgment of acquittal. Finally, James claims his trial counsel was ineffective in several particulars.

II. Severance. James first contends the district court erred by denying his request to sever his trial from Dixon's. He claims their defenses were at odds, each implicating the other. Defendant also contends prejudicial evidence involving drug trafficking that was admitted against Dixon had a "spillover" effect in prejudicing the jury against him. He argues this "spillover" effect is another reason why separate trials were necessary. Defendant did not raise the

"spillover" argument before the district court. As a result, he has waived his right to appeal this issue. *See State v. Frazier,* 559 N.W.2d 34, 39 (Iowa Ct. App. 1996). Therefore, we only consider defendant's argument that the district court erred in denying his motion to sever because the codefendants' defenses were at odds.

We review challenges to a trial court's denial of a motion to sever for an abuse of discretion. *State v. Leutfaimany,* 585 N.W.2d 200, 203 (Iowa 1998). An abuse of discretion exists where there is sufficient prejudice to constitute a denial of a fair trial. *Id.* To cause this type of prejudice, the codefendants' defenses must be more than merely antagonistic. *State v. Snodgrass,* 346 N.W.2d 472, 475 (Iowa 1984). Rather, their defenses must "conflict to the point of being irreconcilable and mutually exclusive." *Id.*

James argues that his defense was irreconcilable with Dixon's defense because each defendant attempted to inculpate the other. However, the desire of one defendant to exculpate himself by inculpating the other defendant is not grounds to require separate trials. *Id.* (citations omitted). Where each defendant testifies at trial that they are innocent and their codefendant is guilty, a trial court abuses its discretion in not granting a defendant's motion to sever. *State v. Sauls,* 356 N.W.2d 516, 519 (Iowa 1984). This was not the case in the joint trial of James and Dixon, where neither defendant testified and no other defense witness for either of them pointed to the guilt of one defendant and the innocence of the other. Instead, each defendant attempted to illicit testimony from the witnesses that was more favorable to him and less favorable to his codefendant. Counsel then attempted to use this testimony to create doubt about their clients'

role in the homicide. We do not find this created irreconcilable defenses which required a severance of trials. Therefore, the district court did not abuse its discretion in denying defendants' motion to sever. [1]

III. Evidence of Gang Activity and Terrorism. The defendant alleges the district court erred in admitting into evidence testimony of gang related activity and an incident of terrorism, which occurred several months prior to Johnson's death. At trial, witnesses testified about a shooting at the Des Moines home of Sharon Barquet in August 1999. Barquet is James's aunt and Dixon's mother. Witnesses also testified that Johnson was a member of the Black Gangster Disciples gang. The purpose of the testimony was apparently to suggest that Johnson was murdered in retaliation for the shooting at the Barquet residence. The defendant claims this evidence was highly prejudicial and had little or no relevance, given the remoteness in time and the lack of evidence connecting the two events.

The State alleges that error has not been preserved with respect to defendant's complaints about evidence of Johnson's gang involvement. Prior to trial, defendant filed a motion in limine that sought to exclude, among other things, evidence of the Sharon Barquet shooting and "evidence of defendant and codefendant's alleged gang activity or membership." In a hearing on the motion, the court denied the defendant's request as to both the shooting and evidence of gang activity. The court held the State was entitled to prove their theory of motive and intent, but warned the prosecutor that he would still be required to lay

[1] In reaching this conclusion, we do not suggest that each defendant had to testify personally to an irreconcilable defense in order to present a claim for severance. *See Leutfaimany*, 585 N.W.2d at 204.

a proper foundation, show how the probative value of the evidence outweighed any prejudicial effect and keep hearsay testimony out of the record.

Generally, a motion in limine is insufficient to preserve error. *State v. Frazier*, 559 N.W.2d 34, 39 (Iowa Ct. App. 1996). An objection is properly preserved when the objection is made at trial. *Id.* However, a defendant is not required to object at trial where a prior ruling on a motion in limine amounts to "an unequivocal holding concerning the issue raised." *Id.* (citation omitted). Because of the district court's warning to the prosecutor regarding the Barquet shooting and evidence of participation in gang activity, we do not find the court's ruling on the motion in limine to be an unequivocal holding on these issues. In order to preserve the issues, defendant was required to lodge an objection when the evidence was raised at trial.

At trial, defendant objected to testimony regarding the shooting of Sharon Barquet that occurred in August of 1999. The objections stated the evidence was irrelevant, immaterial, remote in time and unrelated to the Johnson shooting that occurred in November of 1999. Defendant's objections were overruled. Defendant did not make any objections at trial to the testimony of Detective Moran regarding Johnson's involvement in the Black Gangster Disciples gang. Defendant has preserved error regarding the introduction of evidence of the Barquet shooting, but not with regard to evidence of Johnson's involvement in gang activity. Therefore, we cannot consider on appeal defendant's arguments regarding the evidence of Johnson's gang membership.

The trial court is given wide latitude regarding the admissibility of evidence. *State v. Wixom*, 599 N.W.2d 481, 487 (Iowa Ct. App. 1999). We will

not disturb a lower court's evidentiary ruling unless we find an abuse of discretion. *Id.* An abuse of discretion occurs when 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).

The State contends evidence that defendant's aunt had been the intended target of an act of terrorism is relevant to establish a possible motive for the murder of Cedric Johnson. Evidence is relevant if it renders the desired inference more probable than it would be without such evidence. *State v. Harris,* 589 N.W.2d 239, 243 (Iowa 1999). The incident involving Sharon Barquet occurred a few months prior to Johnson's death. The State offered evidence that Johnson was a member of a local street gang. Other evidence revealed James went to Johnson's residence a few hours before Johnson was shot and killed and spoke with the victim before being asked to leave. As previously noted, the defendant and codefendant are close relatives of Barquet. The State argues this evidence supports the desired inference that James and Lewis shot Johnson in retaliation for the earlier incident at the Barquet residence. The district court admitted the evidence as relevant to motive and intent.

Defendant claims the evidence should have been excluded because its probative value, if any, was outweighed by the danger of unfair prejudice. He claims the evidence implies that the murder of Johnson occurred because Johnson was in a different gang than the defendant and codefendant, and that this evidence would appeal to the jury's instinct to punish gang members. *See State v. Nance,* 533 N.W.2d 557, 562 (Iowa 1995). We agree with the defendant's claim that the probative value of this evidence is diminished by the

State's failure to demonstrate a direct connection between Johnson and the August shooting at the Barquet residence. However, even if the connection is weak, or even lacking, we do not believe James suffered prejudice. In *Nance,* a police officer testified that while searching the defendant's home, he found a note with an encoded message similar to notes the officer had found in other gang members' homes. *Id.* In the present case, there was no evidence that the defendant or his codefendant were members of a gang. *Nance* is distinguishable because in this case, it was the victim who was labeled a gang member rather than the defendant. In addition, evidence of the prior shooting was not offered as a prior criminal act of the defendant or his codefendant. Therefore, we conclude admission of the evidence was not prejudicial to James.

Finally, defendant argues the evidence was irrelevant because it was too remote in time. Evidence is irrelevant due to remoteness only where "the elapsed time is so great as to negative any rational or logical connection between the facts sought to be proved and the evidence offered." *Harris,* 589 N.W.2d at 243. The trial court did not find the mere passage of a few months rendered the evidence of the Barquet shooting irrelevant. We find the trial court was within its discretion to allow the evidence.

IV. Sufficiency of the Evidence. Defendant argues the evidence was insufficient as a matter of law to establish beyond a reasonable doubt that he committed the murder. On appeal, he claims there was no evidence establishing he was in possession of a gun. He also contends there was no evidence that defendant possessed a motive to shoot Johnson.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* We view the evidence in the light most favorable to the State, but consider all of the evidence, not just the evidence that supports the verdict. *State v. Jacobs,* 607 N.W.2d 679, 682 (Iowa 2000). Circumstantial and direct evidence are equally probative. *State v. Boley,* 456 N.W.2d 674, 679 (Iowa 1990).

We find sufficient evidence supports defendant's conviction. Although defendant claims there was no evidence he was in possession of a gun, the testimony of two eyewitnesses supports this fact. Marie Van Dyke testified that after the shooting she drove the defendants to the river where she observed both men in possession of guns. She then witnessed the defendants throw their guns into the river. Although the guns were never recovered, bullets from two different caliber guns were found at the crime scene. Van Dyke also heard the defendant state that he shot a man in the chest. An autopsy revealed Johnson died from a chest wound. Furthermore, Richard Lewis, who was in the home on the night of the murder, testified that he saw the defendant standing in the lawn with a gun. He was able to identify the defendant from a photographic array. Finally, Charlie Smith testified that defendant confessed to her that he had shot Johnson.

Defendant challenges the credibility of the trial testimony of both Van Dyke and Lewis. The credibility of a witness and the weight of their testimony is the province of the jury. *State v. Laffey,* 600 N.W.2d 57, 59 (Iowa 1999). While

there may be conflicting testimony in the record regarding a witness's credibility, the jury is in the best position to judge whom and what to believe. *State v. Knox,* 536 N.W.2d 735, 742 (Iowa 1995). "A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity." *State v. Speaks,* 576 N.W.2d 629, 632 (Iowa Ct. App. 1998). Because we do not find the testimony of Van Dyke and Lewis to be impossible, absurd, or self-contradictory, we will not disturb the jury's assessment of their credibility.

Defendant also claims there was no showing that he had a motive to shoot Johnson. Although lack of motive may be considered in determining whether a defendant acted with premeditation or deliberation, motive is not an element of murder. *State v. Hoffer,* 383 N.W.2d 543, 549 (Iowa 1986). Therefore, even if evidence of motive is weak or nonexistent, it would not matter because the State need not prove motive. *State v. Lass,* 228 N.W.2d 758, 765 (Iowa 1975).

Because there is sufficient evidence by which a reasonable jury could find beyond a reasonable doubt that defendant committed murder, we affirm the jury's conviction.

V. Ineffective Assistance of Counsel. Defendant alleges his trial counsel was defective in several respects. He claims counsel was ineffective in (1) failing to timely challenge the make-up of the jury panel, (2) failing to object to testimony pertaining to possible gang participation of the defendants and the victim, (3) failing to file a motion to suppress the testimony of Charlie Smith, (4) failing to fully investigate and develop a defense showing that Johnson was armed, and (5) failing to call an expert witness on eyewitness identifications.

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We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin,* 587 N.W.2d 606, 609 (Iowa Ct. App. 1998).

A. Failure to Object to Jury Composition. Defendant claims his counsel was ineffective for failing to challenge the racial composition of the jury because there was only one African-American on the jury panel and because that individual was struck from the panel without good cause.

The record shows that defendant's counsel made a *Batson* challenge to the strike of the only African-American on the jury panel. It appears from the record that the challenge was made during the jury selection, that the trial court reserved ruling on the challenge, and that at the end of jury selection the trial court overruled the defendant's challenge. Because voir dire was not recorded, the trial court allowed a formal record to be made on the issue after selection was completed. Both counsel for the defendants and the county attorney were allowed to recount their arguments. At the conclusion of the arguments, the court overruled the defendants' challenge and articulated its reasons. It appears

then that counsel made a proper *Batson* challenge to the State's peremptory strike of the sole African-American member of the jury panel. Therefore, we cannot find counsel's representation was deficient on this point.

It appears the defendant also contends counsel was ineffective in failing to challenge the racial make-up of the jury panel under Iowa Rule of Criminal Procedure 17(3). Rule 17(3) allows a party to challenge a jury panel on the grounds that there was a material departure from the statutory requirements for drawing a jury. The Sixth Amendment to the United States Constitution guarantees a jury will be drawn from a fair cross-section of the community. *State v. Watkins*, 463 N.W.2d 411, 414 (Iowa 1990). A defendant may challenge the racial composition of a jury panel by establishing a prima facie violation of the sixth amendment. *Id.* To establish this prima facie violation, a defendant must show:

> (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. (citation omitted). Defendant has not presented any evidence to suggest that the underrepresentation of African-Americans on the jury panel was due to systematic exclusion. As a result, we cannot find counsel breached an essential duty in failing to challenge the racial composition of the jury panel and was thereby ineffective.

B. Failure to Object to Evidence of Gang Activity. Defendant also contends counsel was ineffective in failing to object to testimony regarding the gang membership of the victim. In *Nance*, the court held evidence regarding a

defendant's involvement in gang activity is inherently prejudicial. *Nance*, 533 N.W.2d at 562. However, we have already distinguished *Nance* from the circumstances of this case where there was no evidence introduced regarding defendant's membership in a gang. We find that evidence of a victim's gang membership is not inherently prejudicial and therefore counsel had no duty to object to its introduction.

C. Failing to Suppress Testimony of Charlie Smith. Defendant alleges counsel was ineffective in failing to file a motion to suppress the testimony of Charlie Smith. He alleges that Smith is a police officer and may have had defendant in her custody when she questioned him about shooting Johnson. The record indicates that at the time of the questioning, Smith was not a police officer but a police cadet. Defendant had known Smith for ten years and had called her to ask for a ride. When defendant got in the car, Smith asked him if he had shot Johnson. There is no credible evidence by which we could conclude defendant was in the custody of the police at the time he answered Smith's question. As a result, counsel had no duty to object to the introduction of this testimony and was not ineffective in failing to do so.

D. Failing to Present a Defense that Johnson was Armed. Defendant next argues counsel was ineffective in failing to fully investigate and present a defense that Johnson was armed and that the bullets found at the scene from the second gun came from Johnson's gun. The record is not fully developed regarding this matter. Therefore, we preserve this issue for a postconviction relief proceeding, if any is brought.

E. Failing to Call Expert Witnesses. Finally, defendant claims he was provided ineffective assistance of counsel because counsel failed to call an identification expert to testify to the lack of reliability of eyewitness identification. As the record is not fully developed with regard to this matter, we preserve this issue for a postconviction relief hearing, if any is brought.

VI. Conclusion. After considering all of the errors alleged by defendant and finding them to lack merit, we affirm the conviction and sentence of defendant James for first-degree murder. We preserve for postconviction relief the issues of whether counsel was ineffective in failing to fully investigate and present a defense alleging the victim was armed. We also preserve for postconviction relief defendant's claim that counsel was ineffective in failing to call an expert witness regarding eyewitness identification.

AFFIRMED.