

IN THE COURT OF APPEALS OF IOWA

No. 1999-313 (9-566) / 98-1038

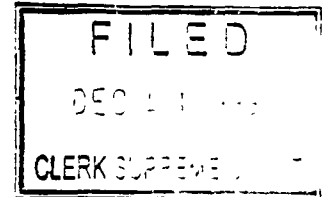
STATE OF IOWA,

Appellee,

vs.

FRED IRVIN MOORE,

Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II
Judge.

Fred Moore appeals his conviction of murder in the first degree in violation of
Iowa Code sections 7087.1 and 707.2 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, and
Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, John P. Sarcone, County Attorney, and Nan Horvat and Jamie Bowers,
Assistant County Attorneys, for appellee.

Heard by Streit, P.J., and Hecht, and Vaitheswaran, JJ.

000633.

VAITHESWARAN, J.

Fred Moore shot Lamar Jones in the head, outside a Des Moines house. Jones later died. A jury found Moore guilty of first degree murder. He appeals, contending. (1) the State discriminated in jury selection; (2) the record contains insufficient evidence to support his conviction; (3) newly discovered evidence warrants a new trial; and (4) his attorney provided ineffective assistance. We affirm.

I. Background Facts and Proceedings

On June 12, 1997, Moore and his passenger Ray Hamill went to see Moore's friend Crystal. She was not at home. As they drove east to the intersection of Sixteenth and Mondamin Streets, they made a sign associated with the Crips gang to a group of people. Moore then swung around the corner and stopped in front of a house on 1540 Mondamin Street. Lance Dixon, Cardell James, and Latoya Lovelady were on the passenger side of the car. Lovelady walked up to the car, and told Hamill this was the area of the rival Vice Lords gang.¹ Moore pointed a gun out his window and fired shots towards the house as he drove off. A bullet hit Jones and passed through his head. He died of a brain swelling as a result of the gun shot wound.

The State charged Moore by trial information with murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2 (1997). Moore claimed self-defense. Following trial and a guilty verdict, Moore filed a motion for new trial and

¹Both the State and defense elicited numerous references to gang membership. Those references are not an issue on appeal. See *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995) (noting evidence of gang membership and activity inherently prejudicial).

in arrest of judgment. The trial court denied the motion and sentenced Moore to life imprisonment. This appeal followed.

II. Discrimination in Jury Selection

Moore is African-American. During jury selection the State exercised a peremptory strike to remove Jackie Blythe from the jury pool. On his juror questionnaire, Blythe indicated he was Hispanic. Moore contends Blythe's removal deprived him of his right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. *See Batson v. Kentucky*, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69, 77-78 (1986). The trial court rejected this contention.

We review constitutional claims de novo. *State v. Griffin*, 564 N.W.2d 370, 372 (Iowa 1997). The Equal Protection Clause prohibits prosecutors from making challenges to jurors based exclusively on race. *Powers v. Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411, 429 (1991).

A challenge based on discriminatory jury selection may be raised even if the defendant and juror are not of the same race. *Id.* at 416, 111 S. Ct. at 1373-74, 113 L. Ed. 2d at 429. A defendant seeking to prove discrimination in jury selection, "must first establish a prima facie case of purposeful discrimination." *Griffin*, 564 N.W. 2d at 375. An inference then arises that the State violated the defendant's equal protection rights. *Id.* Next, the burden shifts to the State to articulate "a clear and reasonably specific" race-neutral explanation for the peremptory strike. *Id.* Finally, the trial court must decide whether the defendant has established purposeful

~~discrimination~~ *State v. Veal*, 564 N.W.2d 797, 806 (Iowa 1997). Because this determination turns primarily on credibility, “a reviewing court should give those findings great deference.” *Griffin*, 564 N.W.2d at 375.

The record reveals the prosecutors did not know Blythe was Hispanic, given his ruddy complexion, blue eyes, and Irish surname. The prosecutors also did not notice the reference to Blythe’s Hispanic origin on his questionnaire, and apparently expressed surprise when the peremptory strike was challenged. The court questioned Blythe as to his Hispanic origin. Blythe responded that his appearance favored his Irish father rather than his Hispanic mother. The trial court found Moore established a prima facie case of discrimination, then gave the prosecution an opportunity to make a record.

One of the prosecutors stated he struck Blythe in part because Blythe had “long grayish hair,” “a fairly full amount of facial hair,” and “looked like a biker.” He suggested Blythe’s attitude and body language when questioned by defense counsel exhibited a “defense mind set.” The prosecutor also made reference to Blythe’s “in-your-face” attitude when a fellow assistant county attorney questioned Blythe earlier in the month, in connection with an unrelated criminal trial. The prosecutor further explained he did not have a practice of excluding minorities from juries, as reflected by the jury composition in a prior criminal case.

The trial court concluded the State presented “a neutral explanation for the prosecutor’s action, that there was no purposeful discrimination in the exercise of the peremptory strike.” We uphold the trial court’s ruling in so far as it rested on

Blythe's unkempt and "anti-establishment" or defense oriented appearance. See *Purkett v. Elem*, 514 U.S. 765, 769, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 840 (1995) (holding strike based on juror's long, unkempt hair, mustache, and beard was race-neutral and satisfied prosecutor's burden of articulating non-discriminatory reason for strike); *Devoil-El v. Goose*, 160 F.3d 1184, 1186 (8th Cir. 1998) (noting scowling, body language, and facial expressions were race-neutral).² We accordingly conclude the State did not violate the equal protection clause in striking Blythe.

III. Sufficiency of Evidence

Moore asserts the evidence is insufficient to support his murder conviction. We disagree. A jury verdict will be upheld if it is supported by substantial evidence. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). We review challenges to the sufficiency of evidence in the light most favorable to upholding the trial court's judgment. *State v. Turk*, 595 N.W.2d 819, 821 (Iowa App. 1999).

Moore contends the State's evidence is unreliable and the record supports his self-defense theory. The State counters defense counsel fully explored issues of witness reliability on cross-examination and Moore's evidence of self-defense was

² In light of our conclusion, we need not decide whether the prosecutor's reliance on Blythe's statements to an assistant county attorney in a different case satisfies the State's burden, where the record here contains no evidence of that prosecutor's questions, Blythe's answers, or that prosecutor's reasons for striking Blythe in the unrelated case. Cf. *Griffin*, 564 N.W.2d at 375 (requiring prosecutor's reasons to be tied to particular case being tried but upholding strike where juror mentioned she sat on a previous jury that returned a charge on a lesser included offense). We also need not address the Polk County Attorney's Office's general practices regarding jury selection.

in turn not credible. A jury is empowered to resolve conflicts in evidence “in accordance with its own views as to the credibility of witnesses.” *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1997).

The jury in this case could reasonably have credited the State’s numerous witnesses who testified Moore was the only person at the scene who fired shots, he directed the shots towards a house surrounded by people, and he was neither blocked nor stopped while firing approximately two shots and then four more while driving off. The jury also could have accepted evidence that the only shell casings found at the scene came from a gun identified as the one Moore used, there were no bullet holes on the driver’s side of Moore’s car, the single hole on the passenger side was present when Moore purchased the car, and the people closest to the car were at least five feet away.

Finally, the jury could have chosen to disbelieve evidence Moore injured his finger when a bullet was shot at him, in light of testimony reflecting the cut was minor, there was no blood in the car, and the injury to Moore’s left pinky finger might have resulted from operating the gun’s slide mechanism. We conclude Moore’s conviction was supported by sufficient evidence.

IV. Newly Discovered Evidence

Moore asserts newly discovered evidence in the form of statements from Chris Wessels and Eric Ware. We review denial of a new trial motion for abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996). To prevail, a defendant must establish the evidence: (1) was discovered after the verdict; (2) could

not have been discovered earlier in the exercise of due diligence; (3) is material to the issues in the case and not merely cumulative; and (4) probably would have changed the result of the trial. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996).

A. Wessels

Wessels testified Moore was a friend of his sister. He stated he saw Lamar Jones, Lance Dixon, and Cardell James outside the car Moore was driving. Wessels claimed they pulled out guns and began shooting, but he was not in a position to see if Moore shot back. Wessels stated he did not come forward before trial because he was afraid of retaliation from the Vice Lords gang. He admitted he told his sister what he saw.

The trial court questioned Wessels's credibility, noting Moore's long relationship with Wessels's sister Crystal, Wessels's stay at the Woodward Academy, and inconsistencies in his statements when compared to the trial evidence. The court noted other witnesses established Jones did not have a gun, there were no bullet holes on the driver's side of Moore's car, and no person at 1540 Mondamin Street fired at Moore's vehicle. The court also concluded Moore's counsel could have discovered this evidence with reasonable diligence, and the evidence would not likely have changed the trial result. We find no abuse of discretion in the court's ruling.

B. Ware

Eric Ware testified he was at his aunt's home, located behind 1540 Mondamin Street. He claimed the first shot he heard came from 1540 Mondamin Street. Next, he saw a passenger in Moore's car shoot back. Ware stated he did not tell anyone

what he witnessed until after Moore's trial. Ware revealed this information to Moore while both were incarcerated in the Polk County jail.

The trial court concluded "the circumstances of this witness coming forward with 'new evidence' is highly suspect." The court found his testimony not credible, inconsistent with Moore's self-defense theory, and cumulative. The court concluded his testimony probably would not have changed the result of trial.

Although we are not convinced Ware's evidence was cumulative, the court's remaining findings and conclusions provide ample support for the court's refusal to grant a new trial on the basis of this evidence. Accordingly, we conclude the trial court did not abuse its discretion in denying the motion for new trial.

V. Ineffective Assistance of Counsel

Moore contends his trial counsel was ineffective for failing to object to prejudicial evidence of Moore's prior possession of firearms. We review ineffective assistance of counsel claims de novo. *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). When such claims are raised on direct appeal, we generally preserve them for postconviction proceedings, to allow full development of the facts surrounding counsel's conduct. *Id.* The record here does not warrant deviation from this general practice. Accordingly, we preserve Moore's claim for postconviction proceedings.

AFFIRMED.