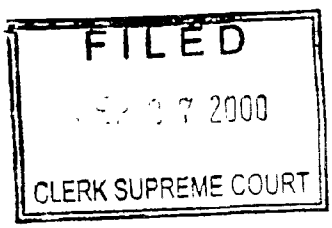
IN THE COURT OF APPEALS OF IOWA

No. 0-393 / 99-0957
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NICHOLAS JAMES CLARK,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Clark appeals from his conviction following a jury trial, for theft in the second degree as an habitual offender in violation of Iowa Code sections 714.2(2), 902.8, and 902.9 (1997). Clark contends the court erred in (1) refusing to grant his motion for judgment of acquittal, (2) refusing to instruct the jury on the issue of the ten-day notice to cure provision of Iowa Code section 714.6, and (3) allowing the State to strike a black juror without providing a neutral reason. Clark is also requesting that certain ineffective assistance of counsel claims be preserved for postconviction proceedings. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Nicholas James Clark, appeals his conviction for theft in the second degree as a habitual offender in violation of Iowa Code section 714.2(2), 902.8, and 902.9 (1997). Defendant contends the district court erred by (1) denying his motion for judgment of acquittal based on the sufficiency of the evidence; (2) refusing to instruct the jury on the issue of the ten-day notice to cure provision of Iowa Code section 714.6 and (3) allowing the State to strike an African American juror without providing a race-neutral reason. Defendant also requests certain ineffective counsel claims be preserved for postconviction proceedings. We affirm.

On January 14, 1999 the defendant went to Helzberg's Jewelers and tried to purchase a diamond ring for $2,330.94. Defendant tendered a personal check drawn on his account with Alcoa Credit Union. Equifacts check service declined the check. The ring was not sold to defendant. Later that same day, defendant went to Fox's Jewelers and purchased a ring for $5,086.94. He paid for the ring with a check drawn from Alcoa Credit Union.

After purchasing the ring the defendant attempted to pawn it at a local pawnshop but was not satisfied with the amount offered by the pawnshop and did not pawn the ring. A police officer in the pawnshop at the time noticed the ring was in a white box with "Fox's" on the box. The officer became suspicious and called Fox Jewelers asking about recent ring purchases. The officer learned defendant paid for the ring with a check. Another officer contacted the Alcoa Credit Union and learned defendant did not have sufficient funds in his account

to cover the check given Fox's. Defendant was arrested and the diamond ring was seized.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4; *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). In deciding whether there is substantial evidence, we view the record in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993).

Viewing the evidence in the light most favorable to the State, there is substantial evidence to support defendant's conviction. Defendant wrote the check for $5,086.94 to Fox's Jewelers even though a check of a lesser amount, $2,330.94, was rejected earlier the same day at Helzberg's Jewelers. Defendant never had a balance of over $200 from the time he opened the checking account on November 12, 1998 until the time he presented a check in the amount of $5,086.94 on January 14, 1999. Defendant was sent eight overdraft notices by Alcoa Credit Union between the end of December 1998 and January 12, 1999.

Defendant argues the testimony at trial indicated his brother was in a position to loan him money to cover some of his expenses. This testimony tells us little because there was no evidence as to the amount of the intended loan.

In theft by check cases, criminal liability should attach if at the time the defendant issued the check, the defendant (1) never had the intention to pay the

check or (2) knew he or she would not be able to pay it. *State v. Hogrefe*, 557 N.W.2d 871, 879 (Iowa 1996). The evidence in the record is sufficient to indicate the defendant knew at the time he gave the check to Fox Jewelers it would not be paid. We affirm on this issue.

Defendant next contends he was deprived of the right to present his theory of defense. Specifically, defendant requested that Iowa Criminal Jury Instruction 1400.18[1] be given. A challenge to the failure to give a jury instruction is reviewed for correction of errors at law. Iowa R. App. P. 4. An appellate court reviews the trial court's instructions "to determine whether they correctly state the law and are supported by substantial evidence." *State v. Walker*, 600 N.W.2d 606, 608 (Iowa 1999).

The instruction the defendant requested allows a jury to infer defendant's guilty knowledge from the failure of a person to cure the lack of funds in the account, if notice is given. The inference provided by this instruction makes the State's case easier to prove. The defendant argues the evidence presented indicated a need for the instruction because people often write checks prior to depositing funds to cover the checks in their checking accounts and they are permitted a ten day window to cure any insufficient funds. This argument is without merit. There is not evidence showing defendant had the intention or the ability to pay the check. *See Hogrefe*, 557 N.W.2d at 879. The ten-day notice is not a defense. Rather it provides the State with an inference by which it can

[1] Iowa Crim. Jury Inst. 1400.18 provides:

> Concerning element number ___ of Instruction No. ___, if the defendant received written notice by certified mail (or notice in the manner of serving an original notice) that the [check] had not been paid by the bank and [he] did not pay the amount within ten days after that, you may conclude the defendant knew the check would not be paid when presented.

establish defendant's guilty knowledge. The district court was correct in denying defendant's request to give Iowa Criminal Jury Instruction 1400.18.

Defendant also asserts the district court erred in allowing the State to strike a black juror without providing a race-neutral reason. Defendant's argument raises the issue of whether his right to equal protection of the law, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Iowa Constitution, was violated. When the defendant asserts constitutional violations, our review is de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

The United States Supreme Court has set forth, under the Equal Protection Clause, a three-part analysis for determining whether peremptory challenges or strikes have been exercised impermissibly on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-24, 90 L. Ed. 2d 69, 87-89 (1986). First, the defendant must establish a prima facie case of purposeful discrimination by showing that he or she is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove prospective jurors of the defendant's race, raising an inference that such exclusion is discriminatory. *Id.* at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87-88. Second, the burden shifts to the State to articulate a race-neutral reason for challenging the jurors. *Id.* at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has established purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88-89. In other words, the court must decide whether to believe the prosecutor's explanation for the peremptory challenges. *United States v. Perez*, 35 F.3d 632, 636 (1st

Cir.1994). The trial court's decision in this regard is accorded great deference on appeal. *Id.*

It should also be noted the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) has held a criminal defendant may object to racebased peremptory challenges regardless of whether the defendant and the excluded veniremen are members of the same race. *United States v. Malindez*, 962 F.2d 332, 333 (4th Cir. 1992). The Supreme Court in *Powers* concluded that the Equal Protection Clause protects against racially motivated peremptory challenges in this circumstance. *Id.* at 334; *Powers*, 499 U.S. at 415, 111 S. Ct. at 1373, 113 L. Ed. 2d at 428. While a criminal defendant and the prospective juror whose exclusion he is challenging need not be members of the same racial group, such "[r]acial identity between the defendant and the excused person" may "provide one of the easier cases to establish . . . a prima facie case . . . that wrongful discrimination has occurred." *Malindez*, 962 F.2d at 334; *Powers*, 499 U.S. at 416, 111 S. Ct at 1373-74, 113 L. Ed. 2d at 429.

The State sufficiently articulated a race-neutral reason for striking an African-American female from the jury pool. The State made the following record to the court outlining the reasoning behind striking this potential African-American juror. The prosecutor stated:

> Your Honor, in this particular case the State exercised their sixth strike in regards to Juror Bonnie Harrington. That juror was an African-American female. For the record, of the 24 jurors who were seated on the panel there were two African-American females. Ms. Harrington indicated during the course of questioning from the attorneys some reluctance to want to serve on a jury. She had indicated that in fact she had made efforts to – when she was first called as a juror to get excused from jury service. During the

> course of the questioning by the attorneys, she had indicated because of her work that she was also somewhat reluctant to serve as a juror.
>
> * * *
>
> During the remainder of the jury selection process when I occasionally would look at Ms. Harrington, she appeared to be in somewhat discomfort from her cold or whatever her illness was.
>
> Based on there considerations, in particular Ms. Harrington not wanting to serve on a jury, not wanting to serve on this particular jury, advising the Court that she was having health problems which she also showed physical signs of, the State chose to strike Ms. Harrington on the basis of her not – her reluctance to serve as a juror and also her suffering at least some type of physical illness that may prevent her from concentrating on the case. That would be all we have.

The district court determined the defendant did not establish purposeful discrimination and accepted the prosecutor's explanation for striking Ms. Harrington. In *State v. Veal*, 564 N.W.2d 797 (Iowa 1997), a prosecutor struck one of the black jurors because she showed no interest in the case or other community events. The Iowa Supreme Court agreed with a similar Eighth Circuit decision that held lack of interest is a legitimate reason for a peremptory challenge. *Veal*, 564 N.W.2d at 807; *see also United States v. Jenkins*, 52 F.3d 743, 746-47 (8th Cir. 1995).

The prospective juror in this case indicated a lack of interest in serving on this jury. She also displayed signs of being physically ill. Both of these reasons provide sufficient race-neutral justification to allow the State to strike her from serving on the jury. Defendants' contention his constitutional rights were violated is without merit. We affirm on this issue.

Defendant raises several claims of ineffective assistance of his trial counsel asking that they be preserved for post conviction relief. Ordinarily,

ineffective assistance of counsel claims are reserved for postconviction relief actions. *State v.* Carter, 602 N.W.2d 818, 820 (Iowa 1999). However, when the appellate record is sufficient to permit a ruling, we will address the claims on direct appeal. *Id.* We find the appellate record sufficient to determine defendant's ineffective assistance of counsel claims.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App.1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm defendant's conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App.1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

Defendant contends first his trial counsel was not effective in stipulating to his prior convictions in the State of Illinois that were relied on by the State to form the basis for his habitual offender status. Defendant contends there is no indication the offenses used to enhance his convictions were felonies under Illinois law. The Illinois convictions are in the record by way of the presentence investigation report. Appellate counsel has failed to present Illinois law showing they are not felonies. Consequently there is no showing that competent representation probably would have changed the outcome on this issue. *See Dunbar*, 515 N.W. 2d at 15.

The defendant has also requested we preserve the following two claims his trial counsel was ineffective for postconviction relief. These claims are that trial counsel was ineffective in failing to object to testimony from the manager at Helzberg's that defendant's check was rejected by Equifacts check service and that his trial attorney asked for a chance to read an exhibit before it was admitted. To succeed on either claim defendant must show but for the alleged errors the outcome of the trial probably would have been different. *See id.* The evidence of rejection by the check service was merely cumulative evidence as there was other uncontradicted evidence that on the day defendant wrote the checks to the two jewelry stores he had less than $200 in his checking account. Assuming without deciding the evidence was inadmissible, defendant has failed to show but for its admission it was probable the result of the trial would have been different. *Id.*

Defendant also contends his trial counsel was ineffective because counsel asking to read an exhibit before it was admitted was evidence he was not familiar

with the document and had not properly investigated and completed proper discovery. Again assuming without deciding trial counsel was not familiar with the document, defendant has failed to advance any reason this fact would probably have changed the outcome of his trial. *See id.*

As discussed above, the State presented substantial evidence of defendant's guilt. The evidence presented would have reasonably permitted the jury to reach the conclusion it did. *See State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996). The defendant failed to establish prejudice from the alleged errors by trial counsel. Defendant cannot demonstrate a reasonable probability the outcome of his trial would have resulted in an acquittal. *See State v. Astello*, 602 N.W.2d 190, 198-99 (Iowa App. 1999). Therefore, we find no basis to reserve these claims for postconviction relief.

AFFIRMED.