

IN THE COURT OF APPEALS OF IOWA

No. 8-256 / 96-1727

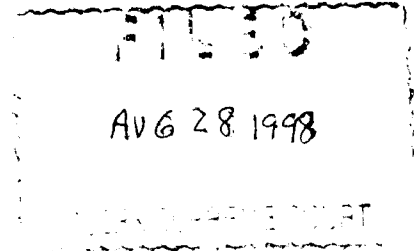
STATE OF IOWA,

Appellee,

vs.

WILLIE LESTER ERVING,

Appellant.



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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch,  
Judge.

Willie Lester Erving appeals from his convictions for possession with intent  
to deliver cocaine and failure to affix a drug stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Kim Griffith and Jeff Harris,  
Assistant County Attorneys, for appellee.

Heard by Cady, C.J., and Streit and Vogel, JJ.

**CADY, C.J.**

Willie Lester Erving appeals his convictions for possession with intent to deliver cocaine and failure to affix a drug tax stamp. He claims the district court improperly admitted into evidence his status as an indigent and the prosecutor removed a potential juror based upon race. We affirm the district court.

Erving was charged with possession with intent to deliver and failure to affix a drug stamp in February 1996 after 3.27 grams of crack cocaine was discovered in his jacket, which was hanging in his locked locker at his work place. There was no drug stamp affixed to the cocaine and no money was found with the drugs.

The case proceeded to jury trial. During jury selection, one of the prosecutors observed the only black member on the jury panel make a facial expression in response to a question concerning Erving's race. This prospective juror also indicated on his questionnaire he was not interested in being on a jury and did not want to miss work. The county attorney voir dired the prospective juror outside the presence of the other panel members and determined he could be impartial and would miss work if chosen. However, the lead prosecutor, who was not present during the voir dire, decided to strike the prospective juror based upon his answers to the questionnaire.

At trial the State presented evidence that the quantity of crack cocaine in Erving's possession was equivalent to more than thirty \$20 rocks. There was also testimony from an employee of the Department of Correctional Services that Erving told him he was never addicted to crack cocaine but only sold it. Erving additionally

submitted to urinalysis numerous times, and he did not test positive on any of the tests.

The State also introduced evidence that Erving had been convicted of delivery of drugs on two prior occasions. To further bolster its case, the State introduced four different financial affidavits for appointment of counsel prepared by Erving. One had been filed in the pending case and the others had been prepared by Erving in connection with prior cases, dating back to 1992.

The jury found Erving guilty of both charges. The district court sentenced him to concurrent, indeterminate thirty-year and five-year prison sentences. The sentencing court required him to serve a minimum of one third of the thirty-year sentence.

On appeal Erving claims the district court erred by admitting his status as an indigent into evidence. He also asserts the prosecutor used a peremptory challenge to strike a juror based upon race.

### **I. Indigent Status**

On appellate review of an evidentiary ruling we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998).

Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. "Although relevant,

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Iowa R. Evid. 403.

Rule 403 does not render all prejudicial evidence inadmissible. *State v. Howell*, 557 N.W.2d 908, 912 (Iowa App. 1996). Instead, it only prohibits *unfairly* prejudicial evidence. *Id.* Examples of unfairly prejudicial evidence which may cause a jury to base its decision on something other than established facts include: evidence that “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action....” *State v. Bayles*, 551 N.W.2d 600, 607 (Iowa 1996) (citing *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988)).

The probative value of an affidavit of indigence can outweigh the danger of unfair prejudice when the financial affidavit “might prove crucial to establishing the elements of the offense charged.”<sup>1</sup> *Sallis*, 574 N.W.2d at 17 (holding defendant’s financial affidavit was more probative than prejudicial where defendant signed a

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<sup>1</sup> Although not raised in this case, we recognize a tension exists between a defendant’s Fifth and Sixth Amendment rights when an affidavit of indigence is admitted into evidence to prove an element of the offense and the defendant elects not to testify. See *United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993); see also *United States v. Hardwell*, 80 F.3d 1471, 1483-84 (10th Cir. 1996); *United States v. Davis*, 958 F.2d 47, 49 n.4 (4th Cir. 1992); *United States v. Gravatt*, 868 F.2d 585, 590 (3rd Cir. 1989). Admitting an affidavit of indigence into evidence can effectively force a defendant to choose between the Fifth Amendment privilege against compelled self-incrimination and the Sixth Amendment right to court-appointed counsel. *Id.*; see also *United States v. Anderson*, 567 F.2d 839, 840 (8th Cir. 1977) (holding where alleged contemnor refused to fill out affidavit of indigence form on ground some of the information might aid a future tax prosecution, trial court should have allowed him to disclose the information in camera after which it would be sealed).

financial affidavit stating he had no income, but \$327 and drugs were discovered on his person); *compare State v. Kane*, 492 N.W.2d 209, 211 (Iowa App. 1992) (holding defendant's affidavit of indigence was admissible to show motive and guilt where the night before a robbery defendant had only \$26, but the morning after the robbery he had \$900) *with State v. Roghair*, 353 N.W.2d 433, 435 (Iowa App. 1984) (holding affidavit of indigence was more prejudicial than probative where defendant pawned a friend's rifle and claimed he planned to earn enough money to redeem it). Thus, we must balance the prejudice to Erving against the State's need for the evidence to establish on an element of the charge.

Erving claims the affidavits not only prejudiced the jury because they showed he used public funds for his defense, but the exhibits admitted also unduly emphasized his status as an indigent. He maintains even if the evidence was relevant, the unfair prejudice outweighed the probative value.

The State maintains the affidavits were essential to prove Erving's intent. It also claims any prejudice from the admission of this evidence was slight. Finally, the State claims even if the district court erred by admitting the evidence, any error was harmless.

Although the exhibits could be considered relevant, they were not "crucial to establishing the elements of the offense charged." *See Sallis*, 574 N.W.2d at 17. This is because the State had substantial evidence supporting the intent element without the introduction of this evidence. This evidence includes: (1) the amount of crack

cocaine was consistent with distribution rather than personal use; (2) a statement by Erving he only sold the cocaine and did not use it; (3) urinalysis tests revealing no cocaine in his system; and (4) two prior convictions.

Furthermore, unfair prejudice resulted to Erving due to the number of exhibits admitted at trial. The State introduced no less than four exhibits. These exhibits revealed Erving's repeated need to rely on public funds to assist his defense. A very real danger of prejudice exists in admitting multiple exhibits of this kind into evidence. *See Davis v. United States*, 409 F.2d 453, 458 (D.C. Cir. 1969) (stating "...[the] courts must be especially alert to prevent a man's rights or liberty from turning on his economic and social status....") We conclude this danger of prejudice, combined with the minimal need for the evidence, made the affidavits inadmissible.

Although we find the district court erred by admitting evidence of Erving's indigency status into evidence, we find this error harmless in light of the strong evidence supporting his guilt. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998) (stating reversal is not required unless prejudice results). Erving was unfairly prejudiced by the admission of the affidavits, but this incident of prejudice was not enough to overcome the strong evidence of guilt. *See United States v. Pavelko*, 992 F.2d 32, 35 (3rd Cir. 1993) (holding State's erroneous use of financial affidavit was subject to harmless error analysis).

## II. Jury Selection

Erving's voir dire claims raises constitutional issues. Our review, therefore, is de novo. *State v. Veal*, 564 N.W.2d 797, 806 (Iowa 1997).

The equal protection clause of our federal constitution prohibits a prosecutor from using peremptory challenges to purposefully strike potential jurors because of their race. *Batson v. Kentucky*, 476 U.S. 79, 85-87, 106 S. Ct. 1712, 1716-18, 90 L. Ed. 2d 69, 80-81 (1986). The United States Supreme Court has set forth a three-part analysis for determining whether peremptory challenges or strikes have been exercised impermissibly on the basis of race. *Id.* at 96-98, 106 S.Ct. at 1723-24, 90 L.Ed.2d at 87-89. First, the defendant must establish a prima facie case of purposeful discrimination by showing the prosecutor has used peremptory challenges to remove prospective jurors based upon race. *Powers v. Ohio*, 499 U.S. 400, 415, 113 L. Ed. 2d 411, 428, 111 S. Ct. 1364, 1373 (1991). The burden next shifts to the State to articulate a race-neutral reason for challenging the jurors. *Batson*, 476 U.S. 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. Because the trial judge's finding whether purposeful discrimination exists largely turns on the evaluation of credibility, we, as a reviewing court, ordinarily should give those findings great deference. *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990).

Erving claims the State used a peremptory challenge to strike the only black member of the panel based upon race. The prosecutor stated she removed the

prospective juror only out of concern over his response on the jury questionnaire. The dialog between the trial judge and the prosecutor supports the conclusion she did not strike the prospective juror based upon his race. The prosecutor's ultimate concern extended beyond the expressed desire of the juror not to miss work, and focused on his expressed lack of interest in jury duty. This is an appropriate reason for exercising a peremptory challenge. *See Veal*, 564 N.W.2d at 807. Furthermore, there was no evidence of a prosecutorial pattern of strikes against black jurors. We also recognize the trial courts ability to evaluate the credibility of the statements and evidence submitted on the issue in making our review. Accordingly, on our de novo review, we find the State removed the prospective juror for a race-neutral reason. *See Veal*, 564 N.W.2d at 807 (finding prosecutor who struck black juror because she had no interest in the case was not a constitutional violation).

We have considered all of Erving's claims and affirm the district court.

**AFFIRMED.**