**IN THE COURT OF APPEALS OF IOWA**

No. 0-566 / 89-1824

FILED
JAN 29 1991
CLERK SUPREME COURT

**STATE OF IOWA,**

Appellee,

vs.

**NORMAN CHARLES WADSWORTH,**

Appellant.

---

Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Defendant appeals his conviction, following a jury trial, for robbery in the second degree. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson, Assistant Attorney General, John Sarcone, County Attorney, and Kathleen Deal, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

**OXBERGER, C.J.**

Norman Wadsworth allegedly took a bottle of vodka from a grocery store and left the store without paying. When pursued by store employees, Wadsworth allegedly assaulted the employees. Wadsworth admitted the theft but denied any assault on store employees; Wadsworth claimed he merely held out the bottle to return it to an employee, and then protected himself from excessive force by the employees.

Wadsworth was charged with robbery in the second degree. A jury found him guilty of that charge. He appeals his conviction. We affirm.

Wadsworth, who is black, contends the district court erred by allowing the State to strike the sole black jury panelist. He argues the State failed to show a racially neutral reason for the panelist's exclusion. In response to the claimed discrimination, the prosecutor stated the panelist was struck because he appeared bored and inattentive and did not seem convinced of the meaning of "beyond a reasonable doubt."

Wadsworth also contends the district court erred by failing to give an instruction on his theory of defense, no assault and therefore, no robbery occurred because he merely resisted unlawful force.

Lastly, Wadsworth challenges the sufficiency of the evidence to support the robbery conviction. He argues the evidence failed to establish an assault and therefore,

failed to prove one of the elements of the crime of robbery.

We review this matter for correction of errors at law. Iowa R. App. P. 4.

Wadsworth first claims the State's use of a peremptory challenge to strike the only black jury panelist violated his due process right to a fair and impartial jury and fair trial. When a defendant alleges error involving a constitutional right, we independently evaluate the totality of the relevant circumstances to determine if such an error occurred. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

In Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69, 87-88 (1986), the Supreme Court set out the test for establishing purposeful discrimination in the selection of a petit jury through the use of peremptory challenges:

> [T]he defendant first must show that he is a member of a cognizable racial group, [citation omitted] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [citation omitted]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary

> inference of purposeful discrimination. . . . Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge of cause. [citations omitted]. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race. [citation omitted].

Applying the test enunciated in Batson, we find Wadsworth has established a prima facie case of discrimination such that the State must present a racially neutral explanation for striking the only black jury panelist. We also find the State carried its burden of presenting such an explanation.

The State justified its peremptory challenge of the panelist mainly because he appeared bored and inattentive, as well as not appearing convinced the standard "beyond a reasonable doubt" did not mean beyond all doubt. The trial court stated it also found the panelist inattentive to such an extent as to justify striking him.

The use of peremptory challenges involves interpreting body as well as verbal responses in an attempt to pick a jury which will fairly judge a defendant's case. We find no reason to disturb the findings of the trial court who was able to independently interpret the responses of the panelist struck by the State. The trial court was

cognizant of the potential for discrimination and sensitive to the situation. Therefore, we find no reversible error in the State's use of a peremptory challenge to strike the only black jury panelist from defendant's jury.

Next Wadsworth claims the trial court erred by refusing to instruct the jury on his defense theory. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Wadsworth's theory essentially stated that since the store employee's engaged in unreasonable force in attempting to stop him from leaving the scene of the crime he did not assault them but rather legally attempted to defend himself against the use of illegal force.

Wadsworth combines two statutes to support his theory of defense. These statutes are Iowa Code section 704.4 (Defense of property) and Iowa Code section 804.12 (Use of force in resisting arrest). Wadsworth argues that under Iowa Code section 704.4 a person may justifiably use reasonable force only to prevent criminal interference with property, but not for recovery of property and since he voluntarily returned the property, any force used against him was unreasonable. Wadsworth relies on State v. Nelson, 329 N.W.2d 643, 646 (Iowa 1983), to bolster his theory. Wadsworth's reliance is misplaced, because Nelson limited its decision to the circumstances of the case, namely where

the attempted retrieval of stolen property occurred after completion of the crime and when the property was out of the presence of the owner. In Wadsworth's case, the employee's attempted to detain Wadsworth while he was walking away from the scene of the crime.

Wadsworth then argues that section 804.12 only prohibits the use of force to resist arrest by a private person summoned or directed by a peace officer, therefore he was justified in resisting the store employees since they were not acting under the direction of a peace officer. Wadsworth fails to address Iowa Code section 808.12 which deals with the detention and search of shoplifters. Section 808.12 states in part:

> 1. Persons concealing property as set forth in section 714.5 [evidence of intent to deprive store or mercantile establishment, either on the premises or outside the premises], may be detained and searched by . . . merchant's employee, provided that the detention is for a reasonable length of time and that the search is conducted in a reasonable manner by a person of the same sex and according to subsection 2 of this section.
>
> 2. . . . .
>
> 3. The detention or search under this section by a . . . merchant's employee does not render the person liable, in a criminal or civil action, for false arrest, false imprisonment provided the person conducting the search or detention had reasonable grounds to believe the person detained or searched had concealed or was attempting to conceal property as set forth in section 714.5.

Relying on the language of section 808.12 we find the instruction submitted by Wadsworth did not accurately state

the law and was not justified under the facts of this case. Iowa Code section 808.12 specifically provided authority for the store's employees to detain Wadsworth for a reasonable length of time. Therefore, the trial court correctly refused to submit the instruction to the jury.

Lastly, Wadsworth asserts insufficient evidence existed to support his robbery conviction. A verdict will be upheld where substantial evidence supports the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). 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. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

With these principles in mind we find substantial evidence supported Wadsworth's conviction. He admitted taking the bottle of vodka from the store and the evidence supports a finding that he assaulted employees of the store in an attempt to escape from the scene.

**AFFIRMED.**