FILED
JAN 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-449 / 89-1781

STATE OF IOWA,

Appellee,

vs.

JACKIE DEAN KNIGHT,

Appellant.

415

Appeal from the Iowa District Court for Webster County, Allan L. Goode, Judge.

Knight appeals his conviction, following a jury trial, for attempted murder. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, James Koll, County Attorney, and James E. Fitzgerald, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Habhab, J., and Perkins, S.J.*

*Senior Judge from the Polk County District Court serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Jackie Knight was charged with attempted murder resulting from a robbery at a convenience store. During voir dire one prospective juror, Nickelson, stated that she was not sure she could serve as a fair and impartial juror because her niece had been "killed by a colored kid a few years ago." Nickelson was excused for cause from the jury.

Later in the voir dire another prospective juror, Ayala, stated that she knew Nickelson and was a close friend of the grandfather of Nickelson's slain niece. Ayala stated that her familiarity with the killing of Nickelson's niece, who she said "was murdered by a black," might make it hard for her to serve as a fair and impartial juror in the present case. Ayala was also excused for cause from the jury.

After these two comments Knight, who is black, moved to strike the entire panel. He asserted the entire panel had been tainted by hearing the two comments, which allegedly suggested that blacks have a tendency to harm others. The district court overruled Knight's motion to strike the jury panel, and the court also declined to grant Knight a mistrial.

The jury subsequently found Knight guilty of attempted murder. He has appealed from the resulting conviction. Knight contends the district court erred by refusing to strike the entire jury panel or to grant him a mistrial. He reiterates his argument that the impartiality of the

entire panel was tainted by hearing the comments of Nickelson and Ayala during voir dire. We affirm.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). Trial courts have considerable discretion in passing on mistrial motions, State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973), and we reverse only upon a showing that that discretion was abused. The rule is that prosecutorial misconduct is ground for reversal only if it deprives the accused of a fair trial. State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). A defendant is entitled to a new trial where it is shown that the prejudicial effect of a prosecutor's or other party's actions remained with the jury. State v. Peterson, 189 N.W.2d 891, 906 (Iowa 1971).

Knight contends that the trial court erred in overruling his motion for mistrial or to strike the jury panel. Knight argues that the comments made by the jurors intimated to the other jurors that Blacks have a tendency to harm others. Knight also maintains that the trial court should have admonished the jurors to disregard the tainted information. We disagree.

In State v. Staker, 220 N.W.2d 613, 615 (Iowa 1974), a prospective juror asked the county attorney if there was

truth to the rumor defendant's license had been suspended at the time of the accident in question. The question was asked in the presence of the full jury panel. Id. The defendant moved for a mistrial on the basis that the question had prejudiced the entire panel and deprived him of a fair trial. Id. The trial court denied the motion, but admonished the jurors to disregard the comment. Id. In affirming the trial court ruling, the Iowa Supreme Court held that "[e]ven though bias or prejudice is established in regard to one or more particular jurors out of the panel such is not ground for challenge to the entire array". Id. at 617. The court went on to hold that "[i]t appears to be well settled as a general proposition of law that a challenge to the array of jurors goes only to the form and manner of making up the jury panel without regard to the objections to the individual jurors who compose it and must, therefore, be based on some ground affecting the validity of the whole panel of jurors." Id. The court went on to opine:

> A trial judge is always in the best position to determine whether such an incident as occurred in this case, which it was impossible to anticipate or guard against calls for a mistrial. Only a clear and obvious abuse of a trial court's discretion in refusing a mistrial will justify a reversal of a case by an appellate court upon a cold record. It is impossible to gather from the cold record the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy.

Id.

In the present case, Mrs. Nickelson, on voir dire, stated that she had a niece who was killed by a "colored kid" several years prior to the present trial. The prosecutor then asked if such an incident was difficult to put out of her mind, and could she guarantee that she would be able to keep an open mind. She responded that she did not think she could. She was then striken from the jury panel. The prosecutor then asked if anyone else had a problem with or had any preconceptions that would prevent them from being a fair and impartial juror. Juror Ayala stated that a good friend of hers that lived down the block from her had a granddaughter killed by a Black man. Ayala stated that she knew Mrs. Nickelson and the grandfather of the girl that was murdered. Ayala stated that she was unable to assure the court that her knowledge would not have any effect on her decision making process. Knight subsequently moved to strike the entire jury panel.

We find no abuse of discretion in the present case. It appears from the record the statements of Mrs. Nickelson and Ayala were limited to their individual reaction to a particular event and not a generalized prejudice against Blacks. Defense counsel asked the panel whether anyone believed that there was more of a "propensity for violence by blacks than whites." The record shows that only one juror responded, stating that she had been a victim of a purse snatching by a Black person. Each juror was asked if they would be comfortable with themselves as jurors if they

were the defendant. The only person who responded was the victim of the purse snatching. There is no evidence in the record showing that the jurors expressed racial bias, either in the form of the views they brought with them into the courtroom, or as a result of the comments made by the two jurors in question.

We further note that Knight made no request for an admonition to the jury. Our courts have recognized that a defendant may not try a case on a new theory not advanced in the trial court. State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983). Thus Knight may not now complain that the trial court failed to admonish the jury. Nor do we believe that such admonition was required, since we have already determined that the reference to Blacks made by the two jurors in question were made from a purely individual reaction to specific events, and were not racially motivated. Moreover, the two jurors were stricken for cause, and removed from the jury panel.

We conclude that the trial court did not abuse its discretion in denying Knight's motion for mistrial or motion to strike the jury panel.

AFFIRMED.