

IN THE COURT OF APPEALS OF IOWA

No. 5-267 / 94-0732

FILED

AUG 17 1995

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

MENZELL L. HUGHES,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Defendant appeals the judgment and sentence entered upon his convictions of second-degree robbery and second-degree burglary in violation of Iowa Code sections 711.3 and 713.5 (1993). **AFFIRMED.**

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

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney
General; Thomas J. Ferguson, County Attorney; and D. Raymond Walton, Assistant
County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

The defendant, Menzell Hughes, appeals from his convictions for robbery in the second degree and burglary in the second degree. He contends: 1) there was insufficient evidence to support the convictions; 2) the trial court erred in overruling his *Batson* challenge to the State's peremptory strike of a black member of the jury panel; and 3) the trial court erred in allowing evidence of his prior criminal record. We affirm.

I. SUFFICIENCY OF THE EVIDENCE.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

On October 2, 1993, a group of six to eight men converged on the victim's vehicle. They took his keys and forced him to leave the car. The men opened the hatch on the car and stole approximately \$1,000 in stereo equipment. Both the victim and an eye witness identified the defendant as the man who took a box containing two twelve-inch speakers from the vehicle.

The defendant concedes the record established that men unknown to the victim committed the assault element of robbery and the breaking element of burglary. However, he argues the record fails to establish beyond a reasonable doubt that he aided and abetted those unknown men in the commission of those acts. The defendant asserts any evidence indicating he aided and abetted in the robbery and burglary was purely circumstantial and amounted only to his presence at the scene and his alleged theft of the two speakers.

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). However, whether evidence is direct or circumstantial, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. *State v. Origer*, 418 N.W.2d 368, 369-70 (Iowa App. 1987).

The jury was allowed to find the defendant guilty of second-degree robbery and second-degree burglary under the principles of aiding and abetting. See Iowa Code § 703.1 (1993). "Under section 703.1, the aider and abettor is held liable for the same crime which he or she has knowingly aided the principal in committing, either by active participation in it or by some manner encouraging it prior to or at the

time of its commission.'" *State v. Satern*, 516 N.W.2d 839, 843 (Iowa 1994), quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977).

To convict a defendant on the theory of aiding and abetting, the State must prove the accused knew of the crime at or before its commission. Such proof need not, and frequently cannot, be established by direct proof. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). The proof may be either direct or circumstantial. *Id.* Neither knowledge nor proximity to the scene of the crime is alone enough to prove aiding and abetting. *Id.* However, such factors in combination with circumstantial evidence, such as presence, companionship, and one's conduct before and after the commission of an offense, may be enough from which to infer a defendant's participation in a crime. *Id.*

The victim had testified the group of men who overcame his car appeared to know what they were doing and there was little conversation among them. The evidence suggested they worked as a unified group with a plan in which one person immobilized the vehicle, another removed the victim from the car, a person gained access to the hatchback area, and others entered the vehicle and removed stereo equipment. While the victim may have initially been unsure as to whether the defendant was a part of the group, the evidence established he saw the defendant near his car, and, within minutes of the onset of the plan, the defendant was witnessed removing speakers from the vehicle. This conduct of the defendant appears to have been an integral part of the plan to rob and burglarize the defendant.

The defendant raises concerns about the consistency of the victim's testimony and his prior statement to the police. The determination of the credibility of the witnesses and the weight of the evidence is the function of the fact finder. *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980). Both the victim and an eye witness identified the defendant as the man who removed the speakers from the trunk and ran off with them. The defendant's presence at the scene, his apparent participation in an organized plan to rob the victim, and his conduct in removing the speakers from the car was sufficient evidence to support the jury's finding that he aided and abetted the robbery and burglary.

II. BATSON CHALLENGE.

The defendant, a black man, contends the trial court erred in overruling his objection to the State's peremptory strike of a black person from the jury panel. The issue of race-based peremptory challenges was addressed in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and *State v. Knox*, 464 N.W.2d 445 (Iowa 1990). Since this claim raises constitutional implications, our review is de novo. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Since a trial court's findings of purposeful discrimination turn largely on an evaluation of credibility, we give those findings great deference. *Batson*, 476 U.S. at 98, n.21, 106 S. Ct. at 1724, n.21, 90 L. Ed. at 88-89, n.21.

In order to establish a prima facie case of discrimination in jury selection under *Batson*, a defendant must first show he is a member of a recognizable minority and the prosecutor used peremptory challenges to remove members of his race from the jury. *Batson*, 479 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. at 87. Next, a defendant is entitled to rely on the fact peremptory challenges "permit those to discriminate who are of a mind to discriminate." *Id.* Finally, a 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." *Id.*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. at 87-88. The relevant circumstances include, but are not limited to, a pattern of strikes against black jurors as well as the prosecutor's questions and statements during voir dire. *Id.* Once the defendant makes the required prima facie showing, the State has the burden of articulating a clear, reasonably specific and race-neutral explanation for the peremptory challenge. *Id.*, 476 U.S. at 97, 106 S. Ct. at 1723, 90 L. Ed. at 88.

The State used a peremptory challenge to strike a black woman who had indicated she had some close friends or family members in jail or prison. The State also struck a white woman whose sons had been prosecuted in Black Hawk County and were imprisoned or awaiting imprisonment. The final composition of the jury panel included a black woman and a Hispanic woman. The prosecutor indicated he had struck the black woman as a juror because she had close friends or family

members in prison and she had not particularly wanted to talk about that during voir dire. The prosecutor felt her reluctance to talk about the issue indicated she had some strong feelings and he did not want to take a chance those feelings would have some kind of effect on her decision in this case. The prosecutor struck this woman as well as other members of the panel because he wanted "to avoid anyone who had any kind of contact with the criminal justice system whose decision in this case might be affected by that experience."

The defendant argues the State's explanation for striking the black woman was not "an adequate neutral explanation because it was not particularly related to [the defendant's] case." The defendant contends the reason articulated by the State would have rendered this juror "unfit for any criminal trial," and it is his contention the State's reason for striking a potential juror must relate to some specific aspect of the case being tried.

The defendant relies on language in *Batson* which states a prosecutor must articulate a neutral explanation "related to the particular case to be tried." *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88. The State responds that defendant is applying too literal of a reading to this passage. In *Purkett v. Elem*, ___ U.S. ___, 115 S. Ct. 1769, ___ L. Ed. 2d ___ (1995), the United States Supreme Court recently clarified this language was intended only to refute the notion that a prosecutor could satisfy his burden of production by merely denying he had a discriminatory motive or by merely affirming his good faith. *Purkett*, ___ U.S. at

____, 115 S. Ct. at 1771, ____ L. Ed. 2d at _____. The *Purkett* decision indicates a prosecutor needs only to offer a nondiscriminatory reason for the strike and not necessarily a reason particularly related to the case being tried. *See id.*, ____ U.S. at ____, 115 S. Ct. at 1771, ____ L. Ed. 2d at _____.

The prosecutor in this case proffered a race neutral explanation for his decision to strike the black juror. She had friends or family in jail or prison and the prosecutor was concerned that would affect her decision in this case. The prosecutor struck a white juror for the same reason. Upon our de novo review we find the State's peremptory challenge to the black juror was not in violation of the defendant's constitutional rights. The trial court properly overruled the defendant's objection on this issue.

III. DEFENDANT'S PRIOR CRIMINAL RECORD.

The defendant argues the trial court erred in allowing evidence of his prior criminal record. Rulings regarding the admissibility of a defendant's prior convictions to attack credibility are within a trial court's discretion and will be disturbed only when such discretion has been abused. *State v. Hackney*, 397 N.W.2d 723, 726 (Iowa 1986).

During the direct examination of the defendant the following testimony was given:

Q. Menzell, on October 2, 1993, did you steal anything from Danny O'Malley from his car? A. No, sir, I don't have to steal and I don't have to break and enter. I go buy things that I want. I'm not a thief.

During cross-examination the prosecutor referred to the defendant's denial of being a thief and asked him if he had been previously arrested for theft. The defendant admitted he had stolen a Nintendo tape from a Target store when he was fourteen years of age. The defendant did not object to the prosecutor's question about the defendant's prior arrest for theft nor does he challenge the propriety of it on appeal.

During his redirect examination, defense counsel elicited the following testimony from the defendant:

Q. Menzell, how old are you? A. Nineteen of age.

Q. How has your behavior changed since you were 14? A. Well my behavior has changed a lot, ladies and gentlemen. I have kids now, responsibilities, trying to -- trying to live, trying to make it, **'cause a little something came at one time when I was a juvenile.** I've learned from my mistakes, you know, to deal with things, not let anger to control you or just to jump out into a rage all of a sudden. Yes, my attitude has changed a lot since the age of 14. I have matured a lot. I have, you know, responsibilities. I have matured a lot since.

[Emphasis added.]

The highlighted testimony gives the impression the defendant had been involved in only one incident of criminal behavior and had otherwise turned his life around. In response to this testimony the prosecutor asked the defendant the following questions during his recross-examination:

Q. Mr. Hughes, you say that since that theft at the age of 14 of some Nintendo games from Target store that you reformed, you cleaned up your act? Is that what you said on direct examination? A. Well as my juvenile, my juvenile life -- I ran into a couple problems as a juvenile, you know. But a little theft, I was young, wanted to play Nintendo, I didn't have no money, you know. But yeah, I've matured.

Q. Well since the age of 14 weren't you involved in a couple of assaults at 17 --

DEFENSE COUNSEL: Your Honor, I'm going to object for the record that the probative value is outweighed by the prejudicial affect [sic].

THE COURT: Overruled. Defendant may answer.

From this point on the prosecutor questioned the defendant about his prior arrests for assault, criminal mischief, harassment, failure to disperse, rioting, disorderly conduct and interference with official acts. The defendant lodged no objections to these questions, and, with respect to most of the crimes, admitted facts indicative of his guilt.

On appeal the defendant argues evidence of his prior criminal record was not properly admissible for impeachment purposes under Iowa R. Evid. 609. The defendant contends the evidence was not admissible because he was not convicted of some of the charges referenced by the State, some of the charges related to delinquency proceedings, and most of the crimes did not involve dishonesty or false statements.

The defendant has not preserved error on this issue. *See State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992) (issue not raised at trial will not be considered on appeal). The defendant raised only one objection to evidence of his prior criminal

conduct.¹ When asked about prior assault charges, he argued the prejudicial effect of that evidence outweighed its probative value. Iowa R. Evid. 403. The defendant made no objection based upon Rule 609. Having been waived, we do not address the merits of this issue on appeal.

We review a Rule 403 objection for an abuse of discretion. *See State v. Munz*, 355 N.W.2d 576, 580 (Iowa 1984). We can find no abuse of discretion in the allowance of questions regarding prior assaults allegedly committed by the defendant. The defendant had "opened the door" to such challenges to his credibility and character when he insinuated he had been involved in only one prior criminal act. Had such evidence not been admitted, the defendant could have misled the jury about the extent of his criminal record. The prejudicial effect of this evidence did not outweigh its probative value, and there was no abuse of discretion in its admission.

AFFIRMED.

¹ We reject the defendant's argument that he was not required to lodge further objections to questions about his criminal record.