IN THE COURT OF APPEALS OF IOWA

No. 0-742 / 00-336
Filed January 24, 2001

FILED
JAN 24 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK DONOVER MARSHALL,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

On appeal following his conviction for first-degree robbery, Marshall contends the trial court erred in denying his challenge to the State's strike of the only African-American on the jury panel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John Lammers, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Hecht, JJ.

STREIT, P.J.

Patrick Donover Marshall appeals his conviction for robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (1999). He claims the trial court erred in denying his challenge to the State's strike of the only African-American on the jury panel. He also claims his trial counsel was ineffective in failing to object to inadmissible hearsay evidence.

On July 17, 1999, Robert Christensen and Billy Clay were watching television in Clay's apartment. A neighbor, George Givens, came to Clay's apartment and asked to use the telephone. Another man, Defendant Patrick Marshall, followed Givens into the apartment. While Givens was talking on the telephone, Marshall leaned over Clay, held a knife to Clay's throat, and demanded money. Clay gave Marshall his wallet. Marshall took $140 out of the wallet and ran out of the apartment.

Later that day, Christensen and Clay gave written statements to police officers. Givens gave an oral statement on the day of the crime, and a written statement the next day. Givens identified Marshall as the person who had followed him into Clay's apartment. Christensen identified Marshall from a photograph line-up. Marshall was charged with robbery in the first degree. A jury found him guilty of this crime. He appeals.

I.* Batson *Challenge.

During jury selection, two prospective jurors reported to the court attendant another prospective juror, Betty Green, had patted Marshall on the back or touched him in some fashion as the jurors were leaving the courtroom for the noon recess. The court attendant alerted the judge, and the judge informed

counsel. The prosecutor questioned Green about the incident before the court, but outside the presence of the other jurors. Green admitted she had touched Marshall. She gave a confusing account of what had happened, stating she had lost her balance, then stating she had not lost her balance. She also mentioned something about her age. Apparently, Green was over seventy years old. The State struck her from the jury.

Marshall, who is African-American, challenged the State's action, claiming the State's decision to strike Green violated his equal protection rights. *See Batson v. Kentucky,* 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986). Green was the only African-American on the jury panel. The prosecutor believed he had antagonized Green by his questions. The court noted the prosecutor was very professional in questioning Green, but she became defensive and appeared emotional or confused. The court also noted there was ample room in the courtroom so physical contact between Green and Marshall would not have been necessary. The court concluded there were racially neutral reasons for the strike.

On appeal, Marshall claims the prosecutor's decision to strike Green was a race-based violation of equal protection. The Equal Protection Clause of the Fourteenth Amendment prevents a prosecutor from using strikes to challenge potential jurors based solely on their race. *Id.*, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83. Our review of this constitutional issue is de novo. *State v. Finnel,* 515 N.W.2d 41, 43 (Iowa 1994).

In order to show a prima facie case of intentional racial discrimination, defendant must show he or she is a member of a cognizable racial group and the

prosecutor excluded the group's members from the jury. *State v. Griffin,* 564 N.W.2d 370, 375 (Iowa 1997). The burden then shifts to the State to show a clear, reasonably specific and race-neutral explanation for the strike. *State v. Keys,* 535 N.W.2d 783, 785 (Iowa App. 1995). The trial court determines whether defendant has established purposeful discrimination. *State v. Veal,* 564 N.W.2d 797, 807 (Iowa 1997). Because the trial court's determination of whether purposeful discrimination occurred "will largely turn on the evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *State v. Knox,* 464 N.W.2d 445, 448 (Iowa 1990).

Marshall contends a prosecutor should not be able to insult a potential juror who is a member of a cognizable racial group, causing the juror to become hostile, and then strike that juror based on hostility. This is not what happened here. The trial court specifically found the prosecutor acted in a professional manner when questioning Green. For whatever reasons, Green became defensive when questioned. "Concern that a juror may be partial, or hostile, to one party surely lies within the scope of permissible reasons for peremptory strikes." *Veal,* 564 N.W.2d at 807. The State gave a sufficient race-neutral reason for striking Green from the jury. Marshall has failed to establish the State engaged in purposeful discrimination.

II. Ineffective Assistance.

A. Written Statement.

Marshall claims he received ineffective assistance because his trial counsel failed to object to the use of Givens's written statement to impeach his credibility. *See State v. Turecek,* 456 N.W.2d 219, 225 (Iowa 1990) (holding a

party may not place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence that is otherwise inadmissible). He asserts he was prejudiced by counsel's failure to make appropriate and timely objections.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

At the time of trial, Givens had poor recollection of some of the details of the robbery. Before Givens testified, the prosecutor proposed introducing Givens's written statement as a past recorded recollection under Iowa Rule of Evidence 803(5). The district court ruled the statement was not admissible under rule 803(5); however, the statement could be used for impeachment purposes, depending on Givens's testimony. The prosecutor then stated that under *Turecek* he could not put Givens on the stand simply to impeach him. *See e.g., State v. Wixom,* 599 N.W.2d 481, 485 (Iowa App. 1999). Defense counsel also objected. The use of the written statement for impeachment purposes was argued and discussed by both parties and ruled on by the court. The court noted Givens could testify to the things he currently remembered, and ruled the written statement could be used for impeachment purposes.

The record does not show defense counsel failed to object to the use of Givens's written statement based on *Turecek.* The record shows the district court was fully aware of this line of objection, from defense counsel and even the

prosecutor. Furthermore, the record does not show Givens was placed on the witness stand solely so his testimony could be impeached with otherwise inadmissible evidence. To the contrary, Givens had a vivid memory of some aspects of the incident in question. He remembered Marshall followed him to Clay's apartment, had a heated conversation with Clay or Christensen, and left precipitously. Thus, Givens was able to corroborate the testimony of Clay and Christensen on certain key elements. Also, Givens clearly identified Marshall as the person who came into Clay's apartment with him. Marshall has not shown he received ineffective assistance due to counsel's failure to object on *Turecek* grounds.

B. Testimony.

Marshall contends his trial counsel was ineffective because he did not object on hearsay grounds to the testimony of officer Robert Duncan about Givens's oral statements. As noted above, at the time of the trial Givens did not recall all of the aspects of the robbery. Additionally, he did not unequivocally endorse his written statement. The district court then allowed Officer Duncan to testify on rebuttal concerning Givens's statements to him on the day of the incident. Defense counsel objected to officer Duncan's testimony on the grounds it was improper impeachment of Givens, but did not object on hearsay grounds.

A prior inconsistent out-of-court statement offered for impeachment purposes falls outside of the definition of hearsay. *State v. Nance,* 533 N.W.2d 557, 561 (Iowa 1995). A prior statement of a witness used to impeach the witness's testimony is not hearsay when the statement is not offered to prove the truth of the statement, but rather to prove the fact the witness made a statement

at a previous time. *State v. Sowder*, 394 N.W.2d 368, 370 (Iowa 1986). Here, Givens's prior statements were offered to show he made the statements at a previous time. We determine the evidence was permissible to impeach Givens's trial testimony. Marshall has failed to show he received ineffective assistance of counsel due to counsel's failure to object on hearsay grounds to this evidence.

We affirm Marshall's conviction for first-degree robbery.

AFFIRMED.