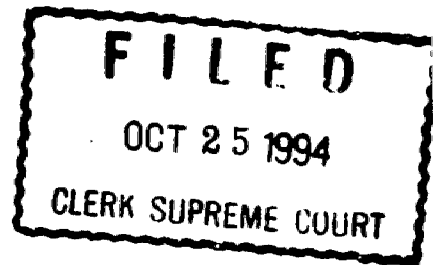


IN THE COURT OF APPEALS OF IOWA

No. 4-340 / 93-1122



STATE OF IOWA,

Appellee,

vs.

WILLIAM ALBERT HARRIS,

Appellant.

Appeal from the Iowa District Court for Johnson County,
Larry J. Conmey and Thomas L. Koehler, Judges.

William Albert Harris appeals from his conviction,
following a jury trial, for two counts of second-degree
burglary in violation of Iowa Code sections 713.1 and
713.5(2) (1993). **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Mary Tabor,
Assistant Attorney General, J. Patrick White, County
Attorney, and Rod Reynolds, Assistant County Attorney, for
appellee.

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

DONIELSON, C.J.

William Albert Harris was convicted of two counts of second-degree burglary. He was identified as the person who had entered rooms at the Currier Residence Hall in Iowa City and had stolen three of the residents' wallets during the early morning hours of December 9, 1992. When confronted in the hallway by a resident, Harris had fled the dormitory and discarded the wallets in the hallway.

On appeal Harris challenges the composition of the jury panel and evidentiary rulings by the trial judge. We conclude Harris has failed to establish a prima facie violation with respect to the composition of the jury panel and there was no abuse of discretion with respect to the disputed evidentiary matters.

I. Composition of Jury Panel.

Prior to trial Harris, who is African-American, filed a challenge to the composition of the jury panel. He alleged a violation of the sixth amendment due to the under-representation of African-Americans on the Johnson County jury panels. A hearing was held and Harris offered both statistical and anecdotal evidence regarding the alleged under-representation of African-Americans on the jury panels. Harris argues that in using a comparative disparity analysis, as opposed to an absolute disparity analysis, he can establish a prima facie case of substantial under-representation.

Evidence at the hearing revealed no records are kept regarding minority representation on Johnson County jury panels. The Clerk of the Johnson County District Court testified six new jury panels of approximately 125 members each are brought in every other month. 1990 census data was offered which indicated African-Americans comprise 2.06% of Johnson County's population. No evidence was introduced regarding the actual number of African-Americans on the jury panel(s) being utilized at the time of the hearing on this matter.

Our review of this constitutional issue is de novo. State v. Watkins, 494 N.W.2d 438, 439 (Iowa App. 1992). A defendant challenging the composition of a jury panel must first establish a prima facie violation of the fair cross-section requirement of the sixth amendment. Id. Once a prima facie violation is established the State has the burden to justify the infringement by showing the attainment of a fair cross-section would be incompatible with a significant state interest. Id.

In order to establish a prima facie case Harris was required to show: 1) the group alleged to have been excluded is a "distinctive" group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this under-representation is due to systematic exclusion of this group in the jury selection process. Id.

The trial court found an absolute disparity of no more than 2.06% could exist in this case. Prior authority indicates this level of disparity would not suffice to establish the level of under-representation necessary to establish a prima facie case. See State v. Huffaker, 493 N.W.2d 832, 834 (Iowa 1992) (2.85% absolute disparity was not a substantial deviation). Furthermore, Harris presented no evidence which establishes the purported under-representation of African-Americans was due to systematic exclusion. The Johnson County Clerk testified voter registration, motor vehicle operator, and phone directory lists were used to compile the panels of prospective jurors. These procedures are consistent with Iowa Code Chapter 607A as interpreted by our supreme court. See Jones, 490 N.W.2d at 794.

Harris invites this court to reexamine Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), and apply a comparative disparity analysis in his challenge to the jury panel. The Iowa Supreme Court previously rejected reliance upon a comparative disparity analysis and has concluded "the absolute disparity computation has been used by the [United States] Supreme Court and is the appropriate method to be used." State v. Jones, 490 N.W.2d 787, 793 (Iowa 1992). This precedent is binding on the Iowa Court of Appeals and we are obliged to decline Harris's invitation to overrule it. See, e.g.,

State v. Hughes, 457 N.W.2d 25, 28 (Iowa App. 1990; Healy v. Carr, 449 N.W.2d 883, 885 (Iowa App. 1989).

II. Rule 404(b) -- Other Acts.

Harris sought to exclude the testimony of four witnesses who would testify they saw him standing outside or entering rooms in University of Iowa dormitories during the early morning hours of December 8, 1992 (the day preceding the burglaries for which Harris was charged). Three of the witnesses testified when Harris discovered occupants in the rooms he had entered on the 8th, he feigned mistake and indicated he was looking for the dormitory where the football players resided.

Harris contends this evidence was unfairly prejudicial and admitted in violation of Iowa R. Evid. 403 and 404(b). A reversal is warranted only if we find a clear abuse of discretion on the part of the trial court. State v. Casady, 491 N.W.2d 782, 785 (Iowa 1992). Evidence of a defendant's other acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Iowa R. Evid. 404(b).

Assuming, without deciding, the acts in question constitute "character evidence" the admission of which is subject to the dictates of Rule 404(b), we conclude there was no abuse of discretion in admitting the evidence. Harris's presence and conduct in the University of Iowa

dormitories on the morning of December 8, 1992, is relevant to the veracity of his claim he was in the Currier dormitory on the 9th to sell papers and was returning wallets he had found on top of a vending machine. Harris's conduct on the 8th evidenced a plan to enter rooms during the early morning hours to steal possessions and to claim mistake if he discovered a room was occupied. The incidents of the 8th are relevant to issues of identity, plan and the absence of mistake or accident, and it was not an abuse of discretion to admit evidence of them at trial.

III. Rebuttal Testimony.

Harris objected to rebuttal testimony offered by the State. During cross-examination Harris testified he had not entered any room in the western end of the north wing of Currier Residence Hall on December 9, 1992. In response the State offered rebuttal evidence from Scott Happel, a resident of Currier Hall, who testified Harris had in fact entered his room at approximately 6:30 a.m. and had apologized and left when he discovered it was occupied. Shortly thereafter Happel heard several people running down the hallway.

Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of material evidence introduced by the accused or which is brought out on his or her cross-examination. State v. Nicholson, 402 N.W.2d 463, 466 (Iowa App. 1987). Although

evidence which has no direct tendency to impeach, contradict, explain, or otherwise rebut evidence is not admissible on rebuttal, the district court is allowed a good deal of discretion in determining the scope of proper rebuttal testimony. Id. A district court's ruling regarding the propriety of rebuttal evidence will be disturbed on appeal only upon a clear showing of abuse of discretion. Id.

Harris argues the name of the rebuttal witness was not made known to him before trial and the rebuttal evidence could have been used in the State's case-in-chief. However, it is not required the name of a witness who testifies in rebuttal be endorsed on the indictment or information, and the fact testimony used in rebuttal might have been used as part of the State's main case does not render it inadmissible as rebuttal evidence. State v. Mayberry, 411 N.W.2d 677, 684 (Iowa 1987). In its case-in-chief the State had presented witnesses who identified Harris as being at Currier Hall and in possession of the wallets on the 9th, but their testimony did not place him as actually being inside any of the dormitory rooms. The rebuttal evidence did so and refuted Harris's testimony that he had not entered any room. It was not an abuse of discretion to admit this evidence.

AFFIRMED.