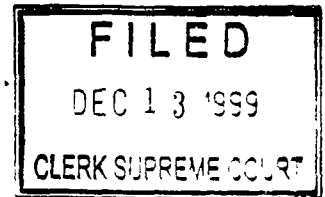


IN THE COURT OF APPEALS OF IOWA

No. 1999-284 (9-514) / 98-2092
Filed December 13, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

KHAM KHOANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The defendant appeals his conviction and sentence, following a jury trial, for one count of possession of a controlled substance with intent to deliver and one count of failure to affix a drug tax stamp. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P.,
Des Moines, for appellant.

~~Thomas~~ J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney,
for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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MAHAN, J.

Defendant Kham Khoang appeals his conviction and sentence, following a jury trial, for one count of possession of a controlled substance with intent to deliver and one count of failure to affix a drug tax stamp. Khoang contends he was denied a fair trial and effective assistance of counsel. We affirm.

Khoang is a thirty-two-year-old male who was born in Laos and whose native language is Laotian. He was arrested by Des Moines police officers after they saw him visit an alleged drug-trafficking house the officers had under surveillance. A police officer followed Khoang's vehicle after he left the residence. The officer attempted to stop the vehicle upon observing Khoang was not wearing a seatbelt. The officer was unable to make the stop because Khoang leaped out of the moving vehicle and took off running. Khoang later doubled back to the vehicle and attempted to leave. The officer grabbed on to the vehicle before Khoang could pull away. The officer shot the right front tire of the vehicle in an attempt to keep it from leaving. Khoang managed to drive away and was later apprehended by the police. At the time of his arrest, Khoang had a cellular phone and a wallet containing \$1456. The officers found a plastic bag containing 25.48 grams of methamphetamine near Khoang's hiding place.

Khoang was charged with one count of possession of a controlled substance with intent to deliver, one count of failure to possess a tax stamp, and one count of

assault while participating in a felony. Counsel was appointed and an order was entered for an interpreter to be present at depositions, pretrial conference, and trial.

Pretrial conference was held on September 24, 1998. On October 8, 1998, Khoang forwarded a letter to the district court requesting the appointment of substitute counsel. At the hearing on the matter, held on October 9, 1998, Khoang expressed his dissatisfaction about the limited amount of contact he had had with his court appointed attorney, alleging (1) his counsel failed to keep him informed about his case, and (2) counsel failed to meet with him as promised. The request was denied, and the October 19, 1998 trial date was confirmed.

The jury trial proceeded as scheduled. The prosecution struck three of the four prospective jurors who were identified as members of recognizable minorities. Following voir dire, the defense counsel raised a *Batson* challenge, which was denied. Although an interpreter was present, Khoang proceeded at trial without the use of the interpreter until part way through his cross-examination.

The matter was submitted to the jury at 2:35 p.m. on October 20, 1998. The jury reached a verdict at 4:25 p.m. that same date. Khoang was convicted on the two drug charges and acquitted on the assault charge. Following his conviction, on October 21, 1998, Khoang forwarded a second letter to the district court expressing dissatisfaction with his court appointed attorney. An interpreter was not present to assist Khoang at sentencing. The district court found Khoang knowingly and voluntarily waived the use of a presentence investigation and sentenced him.

Khoang appeals and raises six issues: (1) the district court erred in denying his request for substitute counsel; (2) the district court improperly limited examination of a defense witness; (3) the district court erred in failing to authorize the services of an interpreter; (4) the district court erred in denying his racial challenge to strikes made by the State during voir dire; (5) the cumulative effect of all errors was so prejudicial he was denied his right to a fair trial and effective assistance of counsel; and (6) his trial counsel was ineffective.

I. REQUEST FOR SUBSTITUTE COUNSEL. Our review is for abuse of discretion. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994).

“While there is an absolute right to counsel, no defendant, indigent or otherwise, has an absolute right to be represented by a particular lawyer.” *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979). **Khoang must demonstrate a sufficient cause to warrant the appointment of substitute counsel. *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). Sufficient reasons include a conflict of interest, an irreconcilable conflict with the defendant, or a complete breakdown in communication between attorney and client. *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995). A defendant must ordinarily show prejudice unless he has either been denied counsel or counsel has a conflict of interest. *Williams v. Nix*, 751 F.2d 956, 960 (8th Cir. 1985); *Jefferson*, 574 N.W.2d at 278.**

Khoang contends the district court should have granted his request for substitute counsel. Khoang does not argue he was either denied counsel or counsel

had a conflict of interest. Instead, he contends counsel failed to keep him informed about his case and failed to spend adequate time consulting with him. Khoang also argues his request, made eleven days before trial, could have been granted without disrupting the trial schedule.

The State argues Khoang had adequate contact with defense counsel and counsel was performing his duties in a satisfactory manner.

The district court found no conflict existed between Khoang and counsel. The district court further found counsel was performing his duties in a satisfactory and competent manner. We have reviewed this matter carefully and conclude the district court did not abuse its discretion in refusing Khoang's request for substitute counsel. We affirm on this issue.

II. LIMITATION OF DIRECT EXAMINATION. Khoang contends he was denied his right to a fair trial because the direct examination of a defense witness was improperly limited. Thus, he asserts our standard of review is *de novo*. However, our supreme court has concluded "[a]n allegedly erroneous ruling ... must go to the heart of the case in order to be considered of such magnitude as to implicate the due process clause." *State v. Veal*, 564 N.W.2d 797, 809 (Iowa 1997) (quoting *State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991)). As in *Veal*, the ruling here does not attain that status. Therefore, our review is for corrections of errors of law. See *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

During the direct examination of defense witness Sai Khoang, defense counsel elicited testimony Khoang had borrowed \$700 approximately two days before he was arrested. Defense counsel apparently then attempted to elicit testimony Khoang had told the witness he needed to borrow the money to pay his rent. The State objected to the proposed testimony as hearsay. Defense counsel argued it was an admission by a party opponent. The district court sustained the objection. Defense counsel did not make an offer of proof.

The State alleges Khoang failed to adequately preserve error on this issue. We agree. Khoang did not make an offer of proof with regard to the excluded evidence. Therefore, the reviewing court is unable to determine the issue of admissibility of the evidence. *See State v. Vincik*, 398 N.W.2d 788, 796 (Iowa 1987). We agree with the State it is not sufficient to simply allege on appeal what the response would have been. Admissibility is to be determined by a record of the actual response of the witness being examined. *See Iowa R. Evid. 103(2)*. This court is not allowed to speculate concerning the substance of the evidence.

In addition, the excluded evidence later came into the record through Khoang's own testimony. This fact and the overwhelming nature of the evidence in this case leads us to conclude Khoang is unable to show prejudice even if error had been preserved. We will not address Khoang's other arguments regarding the admissibility of the proposed testimony because they were not presented to the district court. *State*

v. Wages, 483 N.W.2d 325, 327 (Iowa 1992). We affirm the district court on this issue.

III. INTERPRETER. Our review for compliance with Iowa Code section 622A.2 (1997) is for errors at law. *State v. Azneer*, 526 N.W.2d 298, 299 (Iowa 1995). To the extent Khoang asserts non-use of an interpreter denied him a constitutionally fair trial, our review is de novo. *See Thongvanh v. State*, 494 N.W.2d 679, 682 (Iowa 1993).

Our supreme court has stated “we are aware that a non-English speaking defendant can only have proper and adequate cross-examination if he is able to understand the testimony of the witnesses and is able to communicate effectively with his defense counsel.” *Id.* Khoang argues he was denied a fair trial because an interpreter was not used throughout the entire course of proceedings, and he was permitted to proceed at trial without the use of the interpreter until part way through his cross-examination despite an awareness by his counsel and the court that he needed an interpreter.

The State contends the district court responded appropriately to his request for an interpreter. We agree. An order was entered for an interpreter to be present at depositions, pretrial conference, and trial. An interpreter was available, and there is no record of an objection by Khoang to non-use of the interpreter or of a request for translation prior to cross-examination.

This is not a case where a defendant requested and was denied the use of an interpreter. The district court appointed an interpreter upon Khoang's request. The district court did not err in this regard. It was a decision for Khoang's counsel, and not the court, to determine the use of said interpreter. We affirm on this issue.

IV. BATSON CHALLENGE. Because this claim raises constitutional implications, our review is de novo. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993); *State v. Keys*, 535 N.W.2d 783, 785 (Iowa App. 1995).

In *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 82-83 (1986), the United States Supreme Court held the equal protection clause of the Fourteenth Amendment prevents a prosecutor from using peremptory strikes to challenge potential jurors "solely on account of their race." *Id.* at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83. A criminal defendant may object to race-based exclusion of a juror, effected through peremptory challenges, regardless of whether the defendant and the excluded juror share the same race. *Powers v. Ohio*, 499 U.S. 400, 415-16, 111 S. Ct. 1364, 1373-74, 113 L. Ed. 2d 411, 428-29 (1991).

In Iowa, we have followed *Batson* in requiring a defendant to first establish a prima facie case of purposeful discrimination in selection of the jury panel. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1722-23, 90 L. Ed. 2d at 87; *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997); *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990). 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 minorities from the jury. *Keys*, 535 N.W.2d at 785 (citing *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87-88). 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 "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.* The relevant circumstances include, but are not limited to, a pattern of strikes against minority 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.* However, merely showing the State used a peremptory challenge to exclude a minority juror falls short of raising an inference of purposeful discrimination. *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990) (citing *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (state's use of peremptory challenges to exclude the only two black jurors did not establish a prima facie case of purposeful discrimination); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988) (fact prosecutor used all its peremptory challenges against blacks, standing alone, does not raise the necessary inference of purposeful discrimination).

When peremptory strikes are challenged, neutral explanations that are based on subjective assessments, such as a juror's demeanor or appearance, must be

carefully scrutinized. *United States v. Jenkins*, 52 F.3d 743, 746 (8th Cir. 1995); *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir.1991). The attorneys should fully develop the record concerning the specific behavior by venire members that motivated the peremptory challenge, *United States v. Scott*, 26 F.3d 1458, 1466 (8th Cir. 1994), and the district court should assess the credibility of the explanation. *Jenkins*, 52 F.3d at 746; *Veal*, 564 N.W.2d at 807. Because the district court is in the best position to evaluate the truthfulness of an asserted explanation, its findings should be accorded deference on appeal. *Hernandez*, 500 U.S. 352, 364, 111 S. Ct. 1859, 1868-69, 114 L. Ed. 2d 395, 408-09; *Jenkins*, 52 F.3d at 746; *Veal*, 564 N.W.2d at 807.

Khoang is an Asian man. The record shows the jury pool consisted of eight Caucasian men, twelve Caucasian women, two African-American men, one Hispanic man, and one Hispanic woman. The prosecution exercised peremptory challenges to strike three of the four prospective jurors who were identified as members of recognizable minorities.

When challenged, the prosecutor gave the following explanations for the use of peremptory strikes to remove minority members of the jury pool: the Hispanic woman was struck because she was a relatively young, single mother of two children, a laborer with a high school education, and failed to make eye contact. One of the African-American men was struck because he did not want to be a juror and indicated he wanted to return to work at Titan Tire. The Hispanic man was struck because he

was assumed to be the owner of a restaurant which was being investigated as the location of trafficking of controlled substances, his responses were cold as to questions about law enforcement and answers regarding questions he asked about methamphetamine. The remaining African-American man was left on the jury because he was older, well-educated, and his responses were warmer.

After these explanations were given, the district court stated:

The Court is not convinced that a *Batson* challenge is appropriate in view of the fact that there still remains on the jury a black male. In any event, having heard the State's reasons for the strikes the Court finds that the *Batson* challenge here and the objections raised by the defense should be and are hereby denied.

Khoang contends the reasons for the strikes articulated by the prosecutor were not race neutral and were not specific enough to ensure there was no deliberate discrimination. The State argues Khoang did not establish a *prima facie* case, and, even if he had, the prosecutor satisfied his burden to articulate clear and reasonably specific race-neutral reasons for striking the three minority prospective jurors. We agree.

The Hispanic woman was struck because she was a relatively young, single mother of two children, a laborer with a high school education, and failed to make eye contact. The fact a prospective juror is single and a laborer can be a race-neutral reason to defeat a *Batson* challenge. *United States v. Thomas*, 971 F.2d 147, 150 (8th Cir. 1992). Furthermore, lack of eye contact has specifically been approved of as

justification for rejecting a prospective juror. *United States v. Bentley-Smith*, 2 F.3d 1368, 1374 (5th Cir. 1993).

One of the African-American men was struck because he did not want to be a juror and indicated he wanted to return to work at Titan Tire. Expression of a lack of interest in serving as a juror can be a legitimate reason for a peremptory challenge. *Veal*, 564 N.W.2d at 807.

The Hispanic man was struck because he was assumed to be the owner of a restaurant which was being investigated as the location of trafficking of controlled substances, his responses were cold as to questions about law enforcement and answers regarding questions he asked about methamphetamine. The demeanor of a prospective juror can provide a sufficiently race-neutral reason. *United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) (citing *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir.1988)) (demeanor sufficient race-neutral reason).

The district court determined defense counsel had failed to establish a prima facie case of purposeful discrimination. The district court further evaluated the prosecutor's explanations and found they were sufficiently race-neutral to withstand a *Batson* challenge. We conclude the district court correctly applied *Batson* in ruling there had not been a violation. We affirm the district court on this issue.

V. CUMULATIVE EFFECT. A defendant can be denied a fair trial by the accumulation of prejudice. *State v. Pierce*, 287 N.W.2d 570, 575 (Iowa 1980); *State v. Voelkers*, 547 N.W.2d 625, 634 (Iowa App. 1996). Even when we find no single

~~error is sufficient~~ to require a new trial, we may order a new trial when we are convinced the cumulative effect of all errors worked to deprive a defendant of a fair trial. *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969); *State v. Hardy*, 492 N.W.2d 230 (Iowa App. 1992). Cumulative effect is not the critical issue of this case. We have already concluded the district court did not err with regard to its rulings on substitute counsel, appointment of an interpreter, and the *Batson* challenge. On the issue of limitation of direct examination, we concluded error was not preserved and, in the alternative, prejudice was not shown. The rulings of the district court do not mandate a new trial. Instead, the critical issue in this case is the performance of defense counsel and the claim of ineffective assistance of counsel. We conclude Khoang has not been denied a fair trial under the cumulative effect doctrine.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). “A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may

be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Khoang's conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). However, we will resolve ineffective-assistance-of-counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We have some concerns with regard to Khoang's claim of ineffective assistance of counsel. However, we have reviewed the record and find it is

inadequate to decide the issue on this direct appeal. Accordingly, we preserve these issues of ineffective assistance of counsel for postconviction proceedings.

VII. Summary. We have carefully reviewed this matter and affirm the rulings of the district court. We preserve all issues concerning ineffective assistance of counsel for postconviction relief proceedings.

AFFIRMED.