IN THE COURT OF APPEALS OF IOWA

No. 1-052 / 10-0853
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAMIE LIZZIE KIRK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

Appeal from convictions of second-degree robbery and first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Mamie Kirk appeals from judgment and sentence entered following a jury trial and verdicts of guilty of the offenses of second-degree robbery and first-degree theft. She argues the district court erred in denying her *Batson*[1] challenge and her motion for new trial. Because we conclude Kirk did not prove the State struck the juror due to his race, and the verdicts were not contrary to the weight of the evidence, we affirm.

I. Background Facts and Proceedings.

At approximately 3:15 on September 23, 2009, thirteen-year-old S.B. was walking home from school when she was approached by a group of three males and one female, all African-American and older than S.B. S.B. was nervous because the group was looking at her and whispering. S.B. brought out her cell phone and started to make a call. She had her phone to her ear when the female in the group struck her in the face and pulled her hair. S.B. fell to the ground, her nose bleeding; she dropped her cell phone.

S.B. stayed on the ground for a short time and then got up to search for her cell phone. She looked for her cell phone several different times but could not find it. S.B. walked home and then returned to the area of the assault with her mother. On the way, her mother telephoned police. S.B. was interviewed by the police and she later identified two individuals as part of the group that approached her from photographic arrays: Mamie Kirk and Antwon Privett.

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[1] Exclusion of a juror solely for race-based reasons implicates the equal protection clause of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 89, 106, S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986); *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997).

A woman who lived in the area where S.B. was assaulted stated she witnessed the assault through her living room window. She saw Kirk, whom she recognized from the neighborhood, and three males approach S.B. The woman saw Kirk raise her fist and she saw S.B. fall. She also saw Kirk take S.B.'s cell phone. The woman identified Kirk and Privett as members of the group involved in the assault from photographic arrays.

Another witness came forward while police were on the scene. This man stated he saw a group and S.B. approach each other. He saw the woman from the group grab S.B.'s hair and pull her down. He stated he saw S.B. return a couple of times and it appeared she was looking for something. He identified Kirk from a photographic array.

Kirk, who is African-American, was charged with robbery in the second degree and theft in the first degree. Jury trial began on March 22, 2010. The State used a peremptory strike against a juror who was born in China, acquired United States citizenship, and learned English as his second language. He has been in the United States for eighteen years, has a Ph.D. in statistics, and works as a statistician for a large corporation. Kirk made a *Batson* challenge to the State's peremptory strike, arguing the strike was racially based. The State responded its strike was based on the juror's limited ability to speak and understand English and consequent limited ability to participate in jury deliberation. The district court ruled the State had articulated a race-neutral reason and denied the *Batson* challenge.

At trial, the defense offered the testimony of several persons, all related to Kirk or Privett, who stated Kirk was elsewhere that day. Antwon Privett testified

he was at the scene of the assault but the woman who struck S.B. was Monique Hill. In rebuttal, the State called Ms. Hill who denied striking S.B. or taking her cell phone. Ms. Hill was brought into the courtroom and shown to S.B. and the man who witnessed the assault. Neither S.B. nor the man recognized Ms. Hill and both reaffirmed that Kirk was the person who struck S.B.

The jury returned guilty verdicts on both counts and Kirk moved for a new trial, arguing the verdicts were contrary to the weight of the evidence. The trial court found the State's witnesses credible, the defense witnesses not credible, and denied the new trial motion. Kirk now appeals.

II. *Batson* challenge.

Kirk first claims the court erred in overruling her challenge to the State's removal of a prospective juror due to his race in violation of *Batson* and its progeny. This claim is premised on the contention that the State violated Kirk's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997). Therefore, our review is de novo. *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App.1995).

In *Batson,* the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory strikes to challenge potential jurors solely because of their race or on the assumption they will be unable to impartially consider the State's case against a defendant of the same race. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83. It set forth the following three-part analysis for

determining whether peremptory challenges or strikes have been exercised impermissibly on the basis of race:

> First, the defendant must establish a prima facie case of purposeful discrimination by showing that he or she is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove prospective jurors of the defendant's race,[2] raising an inference that such exclusion is discriminatory. Second, the burden shifts to the State to articulate a race-neutral reason for challenging the jurors. Finally, the trial court must determine whether the defendant has established purposeful discrimination. In other words, the court must decide whether to believe the prosecutor's explanation for the peremptory challenges. The trial court's decision in this regard is accorded great deference on appeal.

State v. Veal, 564 N.W.2d 797, 806–07 (Iowa 1997) (citations omitted), *overruled in part on other grounds by State v. Hallum*, 585 N.W.2d 249, 253 (Iowa 1998).

In determining whether a defendant has made the requisite showing of purposeful discrimination, the court should consider all relevant circumstances including the prosecutor's questions and statements during voir dire. *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990). Once a defendant has made a prima facie case of purposeful discrimination, an inference arises that the government violated the defendant's equal protection rights and "the state has the burden of articulating a clear and reasonably specific" race-neutral explanation for the strike. *Id.*

> [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that [the prosecutor] challenged jurors of the defendant's race on the assumption—or [the prosecutor's] intuitive judgment—

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[2] "[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races." *Powers v. Ohio*, 499 U.S. 400, 402, 111 S. Ct. 1364, 1366, 113 L. Ed. 2d 411, 419 (1991).

> that they would be partial to the defendant because of their shared race.

Batson, U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88 (citations omitted). The race-neutral explanation must be "related to the particular case to be tried." *Id.* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88. "Because the trial judge's finding whether purposeful discrimination exists will largely turn on evaluation of credibility, a reviewing court should give those findings great deference." *Knox*, 464 N.W.2d at 448 (citing *Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. at 1724 n. 21, 90 L. Ed. 2d at 89 n. 21).

Even if we assume that Kirk established a prima facie case of purposeful discrimination, upon our de novo review and after giving appropriate deference to the trial court's finding, we conclude Kirk has not established a case of purposeful discrimination. The prosecutor gave a clear and specific race-neutral explanation for the strike, the language barrier, after having had a fairly lengthy exchange with the juror about his understanding of English and having had difficulty understanding the juror's remarks. The court acknowledged also having had difficulty understanding the juror. We conclude the trial court did not err in denying Kirk's *Batson* challenge to the State's strike of Mr. Zhang. We affirm on this issue.

III. Motion for new trial.

Kirk also contends the trial court abused its discretion in denying her motion for new trial. The district court may grant a new trial "[w]hen the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). Contrary to evidence means "contrary to the weight of evidence." *State v. Ellis*, 578 N.W.2d

655, 658 (Iowa 1998).[3] "The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *State v. Reeves*, 670 N.W.2d 199 (Iowa 2003) (quoting *Tibbs v. Florida*, 457 U.S. 31, 37–38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)).

"The district court has broad discretion in ruling on a motion for new trial." *Reeves*, 670 N.W.2d at 202. Thus, our review is for an abuse of that discretion. *Id.* Here, the defendant must show the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent unreasonable. *Id*.

Kirk contends there is little credible evidence she committed a theft or had the intent to commit a theft, noting only one witness claimed to have seen the defendant take the cell phone. The trial court rejected the claim stating:

> It's very clear from this evidence that this Defendant was identified by three different people as being present at the scene and committing the assault. It's equally clear from the evidence that the victim had the cell phone and was talking on it before the assault. It's equally clear that the cell phone wasn't here at the scene after the assault. The only reason that this Court could think of why someone would hit someone out of the clear blue, people just don't do it. They have to do it for a reason. A very good reason in this particular instance would be to take the cell phone.
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> In addition to that inference from the evidence, we have an eyewitness that says she saw it and that eyewitness knew this particular Defendant before . . . .

In addition, the court found the eyewitnesses credible and "the witnesses for the defense, the Court found, to be not credible." The court thus rejected the claim

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[3] The *Ellis* court noted that on a motion for new trial, the court "'may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.'" 578 N.W.2d at 658–59 (quoting 3 Charles A. Wright, *Federal Practice & Procedure* § 553, at 245–48 (2d ed.1982)).

that the verdicts were against the weight of the evidence. We find no abuse of discretion in that ruling.

IV. Conclusion.

Kirk did not prove the State struck the juror due to his race and therefore we affirm the trial court's denial of the *Batson* challenge. The verdicts were not contrary to the weight of the evidence. We affirm.

AFFIRMED.