IN THE COURT OF APPEALS OF IOWA

No. 3-511 / 12-1425
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARQUISE JIMMY JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Marquise Johnson appeals his conviction for assault causing serious injury as a habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams and Patricia Reynolds, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, John B. McCormally, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DOYLE, P.J.

Marquise Johnson appeals his conviction for assault causing serious injury as a habitual offender, in violation of Iowa Code sections 708.2(4) and 902.8 (2011). Johnson contends his trial counsel was ineffective in several respects regarding his assertion of self-defense. He also claims the district court erred in overruling his *Batson* challenge to the State's strike of a proposed juror. We affirm.

I. Background Facts and Proceedings

From the evidence introduced at trial, the jury could have found the following. In the early morning hours of March 23, 2012, Marquise Johnson stabbed Markus Harding. Prior to the stabbing, Johnson and Harding spent the day drinking and "kicking it" in Waterloo. By the time they went to the Edo's Club at around 9:00 or 10:00 p.m., they were "already drunk." They continued drinking at the club.

When the club closed at 2:00 a.m., Johnson and Harding went to the house Harding shared with his fiancé, Jericka Simmons. Jalisa Simmons, Jericka's sister and Johnson's girlfriend, was also at the house. An argument broke out.[1] Johnson and Harding began wrestling and "talking crazy to each other." The fight ended when Harding realized he had been stabbed by Johnson.

[1] According to Harding, Jalisa was "being crazy" and "hollering" at Johnson because Johnson had lied to her about his whereabouts that night. When Johnson failed to calm Jalisa down, Harding intervened and told Jalisa she had to be quiet or leave because his landlord was "strict about the noise level" "[e]specially at certain times of night." Jalisa then began arguing with Harding, and Johnson and Harding started "tussling."

Johnson also testified. Although he contradicted himself several times, Johnson's testimony indicates he and Jalisa were in the bathroom kissing when Harding kicked at the door to tell them he was going to kill Jericka. Johnson testified he calmed Harding down, and then he and Jalisa went to the bedroom and resumed kissing.

Johnson ran away from the apartment holding a small knife in his hand. Jalisa, Harding, and Jericka ran outside after Johnson. Harding "fell to the ground" and "passed out." He was taken by ambulance to the hospital where doctors realized his injury was life-threatening. Harding repeatedly stated "Blue" stabbed him.[2] Harding had two stab wounds: a minor wound near his ribs, and a more serious wound in the lower quadrant of his abdomen, which had pierced his abdominal wall. Harding underwent surgery to repair his injuries and spent nine or ten days in the hospital.

While he was in the hospital, Harding assisted police officers with an effort to record his phone conversation with Johnson. During the conversation, Harding repeatedly stated Johnson had "poked" him. According to the officer listening to the phone call, Johnson did not deny he had "poked" Harding. Johnson testified he denied stabbing Harding and stated Harding got himself stabbed unintentionally while Johnson attempted to wrestle the knife away from him.

On April 26, 2012, the State filed a trial information charging Johnson with willful injury as a habitual offender. On May 10, 2012, Johnson entered a plea of not guilty. On July 13, 2012, new counsel was appointed to represent Johnson following the removal of Johnson's first attorney due to a conflict of interest. At the pretrial conference on July 20, 2012, Johnson's counsel informed the court,

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Harding then started kicking on the bedroom door. When Johnson opened it, Harding burst into the room holding a knife, angry at Jalisa for sending a text message he interpreted as offensive. Johnson stated he stepped between Jalisa and Harding, and a struggle ensued, during which Harding was unintentionally stabbed. Johnson testified he was able to get the knife from Harding, but fled when Harding said he was going to get his gun.

[2] "Blue" is Johnson's nickname. Harding did not know Johnson's full name at the time the stabbing occurred.

"[Johnson] and I are both prepared to go to trial and he will not be waiving speedy trial."

Trial commenced as scheduled on July 24, 2012. During jury selection, Johnson's counsel first raised the issue of self-defense, and the State objected to the admission of testimony from Jalisa Simmons that Johnson acted in self-defense. Counsel indicated he intended to call Jalisa as a witness but was "not sure what she's going to testify to" because he had only been on the case for one week, and he would "be happy to file" a notice of self-defense. The State objected to the defense offering evidence of self-defense from any witness other than Johnson. The district court informed the parties the notice was "way outside the [40-day] time frame as to when it should have been filed," and the court was "on notice" of the State's objection.

The State presented testimony from Harding, Jericka, Waterloo police officers, and the physician that treated Harding. Defense counsel presented testimony from Johnson as to his version of the incident: namely, that he was acting in self-defense. The court also allowed testimony from Jalisa "for the limited purpose of testifying that she was in the bedroom when [and where] this incident occurred and [Jericka] was not in or near the bedroom when this matter occurred."

A jury found Johnson guilty of the lesser included charge of assault causing serious injury. Johnson appeals.

II. Ineffective Assistance of Counsel

Johnson claims his trial counsel was ineffective in several respects regarding his assertion of self-defense. He contends counsel failed to: "secure

and present meaningful testimony from Jalisa Simmons in support of [his] assertion of self-defense," "file a timely notice of defense," "argue good cause to otherwise support admission of [Jalisa's] testimony," "make a record as to the substance of [Jalisa's] testimony," and "present significant testimony from [Jalisa] on peripheral matters supportive of [his] credibility."[3]

We review claims of ineffective assistance of counsel de novo. *State v*. *Clay*, 824 N.W.2d 488, 494 (Iowa 2012). To prevail on his claim, Johnson must show counsel (1) failed to perform an essential duty and (2) prejudice resulted. *See Everett v*. *State*, 789 N.W.2d 151, 158 (Iowa 2010). The claim fails if either element is lacking. *Anfinson v*. *State*, 758 N.W.2d 496, 499 (Iowa 2008).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *Clay*, 824 N.W.2d at 494. "'That is particularly true where the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues.'" *Id.* (quoting *State v*. *Rubino*, 602 N.W.2d 558, 563 (Iowa 1999)). If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

The State contends ineffective-assistance-of-counsel claims relating to Johnson's assertion of self-defense should be resolved on direct appeal via the prejudice prong. According to the State, Johnson suffered no prejudice from counsel's failure because "Defendant's own statements were that he was not justified in stabbing Harding." The State points in part to following statement

[3] Johnson raises similar claims in his pro se appellate brief.

made by Johnson at trial: "I can't say that I was justified for doing what I did to Mr. Harding that night, but I feel that I had to protect my girl and me." We decline the State's invitation to decide the claims under the prejudice prong on direct appeal where Johnson's statement, taken in context, could actually be construed to lend support to his assertion of self-defense.[4] We further recognize this is essentially a "he said, he said" case where the only people present in the room when the incident occurred were Harding, Johnson, and Jalisa.

In sum, aside from the lack of record relating to questions of counsel's performance, and considering the evidence before the jury, we are not in a position to determine "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v*. *Washington*, 466 U.S. 668, 695 (1984).

Upon our review, we find the record is inadequate to decide these issues on direct appeal. Accordingly, we preserve the matter for possible postconviction relief proceedings.

III. *Pro Se Claims*

Johnson claims the district erred in rejecting his challenge to the removal of "juror number 14," an African-American juror under the principles of *Batson v*. *Kentucky*, 476 U.S. 79, 89 (1986) (holding that 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"). Johnson alleges

[4] As the State acknowledges, the jury "clearly believed" Johnson when he testified he did not intend to hurt Harding, "as they did not find the State had proved the specific intent element of Willful Injury, instead finding Defendant guilty of Assault Causing Serious Injury."

the prosecutor "failed to produce any factual basis to strike the young female juror [number 14] which . . . placed the jury selection in the racially biased position favoring the State."

Exclusion of a juror solely for race-based reasons implicates the Equal Protection Clause of the United States Constitution. *Batson*, 476 U.S. at 89; *State v*. *Griffin*, 564 N.W.2d 370, 375 (Iowa 1997). Our review of this issue is therefore de novo. *State v*. *Lindell*, 828 N.W.2d 1, 4 (Iowa 2013).

During jury selection, upon trial counsel's *Batson* challenge, the prosecutor gave the following reason for striking the prospective minority juror number 14 at issue:

> Struck juror number 14 [age twenty] for the same reason that I have also struck juror number 1 [age nineteen]. I also struck juror number 23 [age twenty] and juror number 15 [age twenty-one]. All four of these individuals are age 21 or under. . . . In my experience people that are that young do not have the kinds of life experiences that bode well for being law-abiding. Not that they can't be, but the more often youthful indiscretions are committed when people are youthful and the people that are single, which I believe all four of these individuals were—I think that all four were either unemployed or students or part-time employees. It's been my experience that the people that have employment and are settled in the community, are more vested in their community, are more conscious of having people obey laws, so it's a—an age thing more than anything else.

The district court thereafter overruled Johnson's objection on equal protection grounds, stating, "Okay. So the State has proffered a race neutral reason. I will accept it. I can't think of any reason why I wouldn't accept the State's explanation and so the record is made in that regard."

Upon our review, we agree with the court's conclusion that Johnson had failed to establish purposeful discrimination had occurred. *See Batson*, 476 U.S. at 96-98. We affirm on this issue.

Johnson raises additional pro se claims taking issue with the jury instructions and an "illegal sentencing issue" but does not support these claims with citations to legal authority or references to the record. We decline to consider his unsupported arguments. *See* Iowa R. App. P. 6.903(2)(g)(3).

IV*. *Conclusion

We preserve Johnson's claims of ineffective assistance of counsel for possible postconviction relief proceedings. We affirm Johnson's conviction and sentence.

AFFIRMED.