IN THE COURT OF APPEALS OF IOWA

No. 7-850 / 07-0113
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARCUS C. DRAPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Marcus C. Draper appeals his conviction and sentence for theft in the first degree. **AFFIRMED**.

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Marcus C. Draper appeals his conviction and sentence after a jury trial for theft in the first degree in violation of Iowa Code sections 714.1(2), 714.2(1) (2005). Finding no error, we affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

In August 2006, Draper and Joseph Ayala left a bar in Cedar Falls at closing time. At some point Ayala was unconscious on the ground bleeding from his head. Two security guards saw an African-American male in a white tee shirt go through Ayala's pockets and remove Ayala's black wallet. One guard saw this male run away and enter a 1998 maroon Dodge Intrepid. Draper is an African-American male and was wearing a white tee shirt that evening.

The police regularly patrol the bar's parking lot at closing time and Officer Smith arrived to help Ayala. Security officers and several bar customers were pointing to the Intrepid in an effort to help Officer Smith sort out what had happened. Officer Smith noted the vehicle's license number and saw it leave at a high rate of speed without its headlights on. Ayala, who had regained consciousness, told Officer Smith his wallet was missing. Officer Smith broadcast the license number of the Intrepid over the radio. Within minutes of the broadcast and about one-half mile away from the bar, Draper was stopped while driving a maroon Intrepid without its headlights on. The car contained three females and one other African-American male in the back seat wearing a red tee shirt.

Draper's sister-in-law, Latasha Robinson, was the owner of the maroon Intrepid and a passenger as the car left the bar. Robinson testified Draper had a

black wallet in his hands and he told her to toss the wallet when the police started to pursue the car because Draper was concerned about a theft or robbery charge if the wallet was found. Robinson refused to toss the wallet. Police found Ayala's wallet in the Intrepid's back seat.

Draper was charged with theft in the first degree and convicted after a jury trial. On appeal, Draper claims the prosecutor removed one juror on the basis of race in violation of his equal protection rights, photographic evidence of the victim's injuries was improperly admitted, and his trial counsel was ineffective.

II. STANDARD OF REVIEW.

We review constitutional claims de novo. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). We review evidentiary rulings for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). We review claims of ineffective assistance of counsel de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007).

III. MERITS.

A. *BATSON* CHALLENGE.

Draper and juror number sixty-four are both African-American. The prosecutor used a peremptory challenge to strike juror sixty-four and Draper claims this action violates his equal protection rights under *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-24, 90 L. Ed. 2d 69, 87-88 (1986). The *Batson* court held under the equal protection clause, a prosecutor may not use peremptory strikes to challenge potential jurors solely on account of their race. *Id.* *Batson* requires a three-step process in evaluating Draper's argument. First, Draper must make a prima facie showing that peremptory challenges were

exercised on the basis of race. *See Miller-El v. Cockrell*, 537 U.S. 322, 328, 123 S. Ct. 1029, 1035, 154 L. Ed. 2d 931, 945 (2003). Second, the prosecution must provide race-neutral reasons for striking juror sixty-four. *Id.* Third, the trial court evaluates the parties' submissions and determines whether Draper has shown purposeful discrimination.

Draper argued juror sixty-four was the only African-American among the first twenty-seven potential jurors and was one of only three in the entire jury panel. Draper has made the prima facie showing required by *Batson*. The State then offered non-discriminatory reasons for using its peremptory challenge:

> [D]uring the voir dire of [#64] I posed to her a series of questions along the lines of exploring her attitudes about reasonable doubt and circumstantial evidence. . . . [I used] a case that I actually prosecuted where there was a blood trail that led from a storefront through an alley into defendant's mother's apartment. And the blood trail, if a juror follows the circumstantial evidence; the natural conclusion would be that the defendant is responsible for having stolen the items from the storefront. [#64] did not seem to accept that, at least, not readily. She – her first inclination was to posit possible excuses for why the suspect . . . would not be the culprit.
>
> We believe that somebody that has the mindset that they are dealing with specific facts that all point towards guilt, but then will try to come up with excuses for the person without ever having heard any excuses, no other facts were put to her that would suggest anything other than guilt, her idea of coming up with possible alibis, other excuses, shows that this is a potential juror that is looking for excuses to acquit somebody. Not the type of person that we believe is a fair and impartial juror, somebody that is going to listen to the evidence that's presented to them rather than looking for an excuse to find somebody not guilty.

The trial court considered juror sixty-four's answers to be a "red flag" and when she "gave her answers concerning the [prosecutor's] example, I guess I was kind of surprised in the way that she answered and in the way that she presented herself in answering." The court also noted juror sixty-four responded

she would do her best not to hold it against a defendant who did not present evidence. Both responses caused the court to conclude it seemed "she may have a preconceived idea one way or another." The court ruled there was a race-neutral reason for the State to exercise its peremptory challenge to strike juror sixty-four and insufficient evidence to sustain a *Batson* challenge.

In light of the State's explanation of its race-neutral reasons for striking juror sixty-four, we conclude there was no purposeful discrimination present in the removal of this juror and on our de novo review we agree with the conclusion reached by the trial court. The prosecutor's strike was based on the specific voir dire responses of juror sixty-four revealing she might be unwilling to give sufficient weight to circumstantial evidence and Draper has failed to prove purposeful discrimination.

B. PHOTOGRAPHIC EVIDENCE OF INJURY.

Draper argues the photographs showing Ayala's facial injuries were irrelevant and unfairly prejudicial. We disagree. The test for relevancy is whether a reasonable person might believe the probability of the consequential fact to be different if he knew of the proffered evidence. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). The photographs showed a swirling-patterned shoe print on the side of Ayala's head similar to the tread on Draper's shoes. This print made it more probable Draper was present at the scene and was involved in the incident that culminated in the theft of Ayala's wallet. Additionally, photographic evidence of the extent of Alaya's injuries is relevant to understanding Alaya's inability to identify the person who took his wallet.

Relevant evidence may still be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. We do not think the photographs of facial abrasions invoke the jurors' passions or prejudices. *See State v. Astello,* 602 N.W.2d 190, 197 (Iowa Ct. App. 1999) (holding gruesome photographs of teenager's decomposing remains not unduly prejudicial). The facial-injury photographs are not unduly prejudicial and we find no abuse of discretion in the trial court's evidentiary ruling.

C. INEFFECTIVE ASSISTANCE OF COUNSEL.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, however, direct appeal is appropriate when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of his ineffective-assistance claims. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here the record is adequate to resolve this issue on direct appeal.

In order to prevail, Draper must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane,* 726 N.W.2d 371, 393 (Iowa 2007). We conclude Draper has not proven his counsel's failure to perform an essential duty in either of this two claims concerning ineffective counsel.

Draper first argues his counsel was ineffective in not making a relevancy objection to the testimony of Officer Smith. Officer Smith stated he took the photographs of Ayala at the hospital and he observed the shoe print on Ayala's head was similar to the tread on Draper's shoes. As discussed above, the similarity between the shoe print on Ayala's head and the tread on Draper's

shoes is relevant. We reject Draper's first argument because his attorney "may not ethically urge grounds that are lacking in legal or factual support simply because his client urges him to do so." *Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006).

Second, Draper argues his counsel was ineffective in not seeking a new trial due to the verdict being contrary to the weight of the evidence. *See* Iowa R. Crim. P. 2.24(2)(*b*)(6); *see also State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). We note trial courts should grant new trials only in exceptional cases where the evidence heavily preponderates against the verdict. *Ellis*, 578 N.W.2d at 659. The evidence of guilt was strong; consequently, Draper's trial counsel had no duty to make a meritless motion for a new trial. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

AFFIRMED.