IN THE COURT OF APPEALS OF IOWA

No. 9-367 / 07-1307
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY DARLANSKY CRUTCHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals from the conviction and sentence for possession of a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Bayens, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J. and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, J.

Defendant Larry Crutcher appeals from the judgment and sentence entered on his convictions for possession of a controlled substance (crack cocaine) with intent to deliver as a subsequent offender under Iowa Code sections 124.401(1)(c)(3) and 124.411 (2007); possession of a controlled substance (marijuana), Iowa Code section 124.401(5); possession of a controlled substance (crack cocaine) with intent to deliver as a subsequent offender, Iowa Code sections 124.401(1)(b)(3) and 124.411; and failure to possess a tax stamp, Iowa Code sections 453B.3 and 453B.12. Crutcher contends the district court erred in rejecting his *Batson* challenge, and raises an ineffective-assistance-of-counsel claim for failing to object to admission of evidence. Crutcher also raises a number of pro se claims. We affirm.

I. Background Facts and Prior Proceedings

On February 23, 2007, Officers Kress and Nicolino, in plain clothes and in an unmarked police vehicle, observed a Chevy Suburban, and recognized the vehicle from days earlier in an area of reported drug activity. When the Suburban failed to come to a complete stop at a stop sign, Kress and Nicolino contacted Deputy Mohr, who was in the area and able to follow directly behind the Suburban. Mohr observed it swerve slightly towards the median, so he activated his emergency lights. The Suburban sped up slightly, then changed lanes, slowed down and went across a bridge before eventually turning off the main road and stopping. The driver, Crutcher, did not have a valid driver's license and was placed under arrest. The officers found approximately $1200 in cash on Crutcher. Officer Kress saw that the passenger window, which had

earlier been rolled up, was now rolled down. He then returned to where they had observed Crutcher pull to the side of the road and slow down, and found a plastic bag containing 2.96 grams of marijuana and nine individually wrapped rocks of crack cocaine. The police then obtained and executed a search warrant of Crutcher's home, and found a box of plastic baggies, a digital scale, and numerous glass vials. Upon testing, some of the vials contained the drug PCP. The officers also discovered what was later determined to be 20.47 grams of crack cocaine. The room where this was all found contained male clothing which appeared to be in Crutcher's size, as well as mail addressed to Crutcher.

Crutcher was charged with three counts of possession of a controlled substance, two of those counts including an additional intent to deliver; one count for failure to possess a tax stamp; and one count possession of a firearm. During jury selection, Crutcher raised a *Batson* objection to the State's use of a peremptory strike of a potential juror. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, (1986). Crutcher objected to striking the only black juror, Patricia Lang, from the jury panel. After a hearing, the court overruled the objection, Crutcher was convicted, sentenced, and now appeals.

II. *Batson* Challenge

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, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83; *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997). Our review is, therefore, de novo. *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995).

Crutcher contends the district court erred in rejecting his *Batson* challenge. "In *Batson* the United States Supreme Court held that the equal protection clause of the fourteenth amendment prevents a prosecutor from using peremptory strikes of potential jurors 'solely on account of their race.'" *Griffin*, 564 N.W.2d at 375 (quoting *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83). A three-part analysis is utilized to determine whether a juror has been impermissibly excluded. *Batson*, 476 U.S. at 96-98, 106 S. Ct. at 1723-24, 90 L. Ed. 2d at 87-89. First, the defendant must establish a prima facie case of purposeful discrimination, showing that he is a member of a cognizable racial group and the prosecutor struck members of the jury pool based on their race. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87; *Griffin*, 564 N.W.2d at 375; *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995). Next, the burden shifts to the State to articulate a race-neutral reason for the peremptory strike.[1] *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88; *Griffin*, 564 N.W.2d at 375. Last, the trial court determines whether the State has proven the absence of purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88-89.

Crutcher argues that he established a prima facie case of purposeful discrimination, as Lang was the only African American potential juror, and the

[1] If the defendant fails to establish a prima facie case, the burden stays with the defendant to prove the presence of purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88.

prosecutor did not establish a race-neutral explanation for the strike.[2] During voir dire, Lang acknowledged that she had been in a relationship with a man who was involved in crack cocaine, stating, "[M]y ex, he was on crack cocaine and it affected our children." The district court questioned whether Crutcher met the burden of establishing a prima facie case of purposeful discrimination. The court found that even if Crutcher had met that burden, "the record made yesterday shows that the State did have a race-neutral explanation for the strike." The prosecutor explained why he felt Lang would make an unsuitable juror, stating that

> race had absolutely and positively nothing to do with the election to strike this juror . . . . I think (a) this juror has specialized knowledge of the area of the trafficking of crack cocaine, involvement of crack cocaine . . . . Whatever color she was, makes no difference to me. Any other person, regardless of ethnicity, in that same situation or that same fact pattern, who had a long-term relationship with individuals that are involved in the sale of the specific substance involved in this case, I would have struck that individual, as well.

To further support his race-neutral reason for striking Lang, the prosecutor pointed the court to his prior strikes, "all centered around individuals who had contact or excessive contact with the use of controlled substances."

However, Crutcher asserts that the prosecutor overstated Lang's "ex's" involvement with crack cocaine, which undercut the prosecutor's justification for the strike. Even if the prosecutor had an imperfect recollection of Lang's voir dire, the court also heard Lang's voir dire responses, and based on the court's

[2] Crutcher claims that based on *Griffin*, the sole act of striking the only black juror established a prima facie case of purposeful discrimination. *Griffin*, 564 N.W.2d at 376 ("The prosecutor in this case exercised her peremptory challenges on the only two African-American prospective jurors, thereby establishing a prima facie case of purposeful discrimination."). However, *Griffin* did not overrule *Knox*, which established that a peremptory challenge to exclude "the sole black juror" fell short of raising an inference of purposeful discrimination. *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990).

recollection, it did not believe that striking Lang from the jury was racially motivated. The district court stated that

> even if the burden were on the State, which I don't believe it is, if it was, I think based on the record . . . of the statements of this juror during voir dire – I do not believe that the striking of this juror, even though she is the only African American on this panel, was racially motivated.

We agree with the district court that even if Crutcher had established a prima facie case of discrimination, the prosecutor articulated race-neutral reasons for striking Lang as a potential juror, and the State proved the absence of purposeful discrimination. Therefore, the district court did not err in rejecting Crutcher's *Batson* challenge.

III. Ineffective Assistance of Counsel

Crutcher next asserts his counsel was ineffective for failing to object to the admission of certain evidence. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Crutcher must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id*. A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire

record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

Crutcher contends that his trial counsel was ineffective by failing to object to testimony that vials containing the controlled substance PCP were found in the bedroom linked to Crutcher. Crutcher was never charged with possession of PCP, so he now claims that this evidence was highly prejudicial. We disagree. If the uncharged offense is "so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other, the general rule of exclusion does not apply." *State v. Nelson*, 480 N.W.2d 900, 905 (Iowa Ct. App. 1991).

The gathering of evidence began shortly after stopping Crutcher's vehicle. Upon arresting Crutcher, the police returned to the area where they had earlier observed Crutcher slow his vehicle down, as they suspected he had thrown something out of the passenger side window. There, the police found a plastic bag containing 2.96 grams of marijuana and nine individually wrapped rocks of crack cocaine. The police then secured and executed a search warrant for Crutcher's home, and in what they believed to be Crutcher's bedroom found a digital scale, a box of plastic baggies, and various vials. The police testified that these were materials commonly used for drug trafficking. The police also found a large amount of crack cocaine in a man's sweatshirt in the closet, and separately found two vials of PCP.

Crutcher claims the evidence of the vials containing PCP, if relevant, was unfairly prejudicial to him under Iowa Rule of Evidence 5.403. The State disagrees, asserting the evidence goes to the intent to deliver element of the

stated charges, verifying the vials were used in the packaging and distribution of the drugs and thereby admissible under Iowa Rule of Evidence 5.404(*b*).

Iowa Rule of Evidence 5.404(*b*) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. Courts have long followed the rule against admitting "bad-acts" evidence to show "that the defendant has a criminal disposition in order to generate the inference that he committed the crime with which he is charged." *State v. Sullivan*, 679 N.W.2d 19, 23 (Iowa 2004). However, bad-acts evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Iowa R. Evid. 5.404(*b*).

For prior bad-acts evidence to be admissible the State must establish the evidence is "relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts." *Sullivan*, 679 N.W.2d at 25. Clear proof must be presented that the individual against whom the evidence is offered committed the bad act or crime. *Id.* If the evidence is relevant, the trial court "must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice." *Id*. Because the weighing of probative value against probable prejudice is not an exact science, we give a great deal of leeway to the trial judge who must make this judgment call. *State v. Newell*, 710 N.W.2d 6, 20-21 (Iowa 2006).

In this case, the mention of the vials during the testimony was relevant in proving Crutcher was involved in the distribution of drugs, establishing the requisite "intent to deliver" element as contained in the charges. Further, the

evidence's probative value was not "substantially outweighed by the danger of unfair prejudice," because even without reference to the PCP vials, there was overwhelming evidence for the jury to have found Crutcher guilty of the charged crimes. *See* Iowa R. Evid. 5.403. Taken together, the circumstantial drug trafficking evidence and the discovered drugs support the verdict that Crutcher had the intent to deliver the drugs. Crutcher cannot show that but for his trial counsel's error, the proceeding would have had a different outcome. *Ledezma*, 626 N.W.2d at 143. Accordingly, Crutcher failed to prove he suffered prejudice from any breach of duty of his trial counsel.

IV. Pro Se Issues

Crutcher also raises a number of pro se issues, which are either not preserved for our review, subsumed in his appellate counsel's arguments, or otherwise without merit.

AFFIRMED.

Miller, S.J. concurs. Sackett, C.J., concurs specially without opinion.