

IN THE COURT OF APPEALS OF IOWA

No. 6-298 / 05-0284

Filed July 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT CHARLES ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Vincent Charles Allen appeals his conviction for robbery in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, J. Patrick White, County Attorney, and Victoria Cole, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Vincent Charles Allen appeals his conviction for robbery in the first degree. He contends the district court erred in overruling his challenge to the State's strike of one of the prospective jurors, and that there is insufficient evidence to support his conviction. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. On May 28, 2003, at approximately 5:45 a.m. Ken Heck was dropping off some items for charitable contribution outside a resale shop in Iowa City. After he unloaded the donations from his truck, Heck heard someone approach him from behind and say "Give me your money." As Heck turned to see who was speaking to him he was hit in the back of the head with a board. Heck described the board as about six inches wide and twenty-four inches long. The assailant was later identified by a witness as the defendant Allen.

A struggle ensued between Heck and Allen and the board ended up on the ground. The two fell to the ground and wrestled around while Allen repeated his demand for money several times, at one point threatening, "Or I'll kill ya." As Heck lay on the ground trying to get his wallet out of his pocket Allen straddled him and continued the assault. Heck eventually got the wallet out of his pocket and it went flying through the air. Allen then got off of Heck, grabbed the wallet, and ran. Heck testified that during the incident he heard someone yell something and Allen responded, "He won't give me his money." Heck suffered a four-inch welt on the back of his head and several scrapes on his body from the asphalt as a result of the attack.

The State charged Allen, by trial information, with robbery in the first degree, in violation of Iowa Code sections 711.1, 711.2, 702.11 and 902.12(5) (2003), for the robbery of Heck. The trial information also charged him with two other robberies, ongoing criminal conduct, and two counts of drug possession. The robbery and ongoing criminal conduct charges proceeded together to jury trial after the district court severed the two counts of drug possession.

The initial panel of twenty-five prospective jurors drawn from the venire included three African-Americans, twenty-one whites, and one Puerto Rican. After passing the panel for cause the prosecutor used her third of six strikes to remove Linda Harris, one of the African-American prospective jurors. The other two African-Americans remained on the jury through return of the verdicts.

After the jury was empanelled and sworn Allen challenged the State's strike of juror Harris under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). He asserted race had been a consideration in the State striking her. A record was made in chambers on the challenge. The prosecutor stated the reason for the strike was

because [Harris] has a psychology major. She's also a counselor at MECCA. Counselors tend to believe that people can be rehabilitated. They are more willing – I don't want to say forgive, but be more lenient, not necessarily hold people responsible, and for that reason I struck Ms. Harris.

The court accepted the explanation for the strike and found the State had struck Harris for a race-neutral reason. Allen made no claim that the reason given by the State was pretextual. The jury sworn in to try Allen included two African-American women, nine white men, and one Puerto Rican man.

The jury found Allen guilty of robbery in the first degree for the robbery of Heck. It found him not guilty of the other counts of robbery and ongoing criminal conduct. The court sentenced Allen to a term of imprisonment not to exceed twenty-five years. Following trial Allen filed a motion for new trial which, in part, argued the court erred in denying his *Batson* challenge because the State's offered explanation for striking Harris was pretextual. The district court summarily denied Allen's motion for new trial.

Allen appeals his conviction, claiming (1) the trial court erred in denying his *Batson* challenge, and (2) the State did not provide sufficient evidence that the board he used to hit Heck during the robbery was a "dangerous weapon" under the definition of a dangerous weapon given to the jury. The State contends Allen did not preserve error on the first issue because he failed to make his "pretext argument" at his first opportunity, when he first raised his *Batson* challenge and the trial court ruled on it.

II. MERITS.

A. *Batson* Challenge.

Allen first claims the court erred in overruling his challenge to the State's removal of a Harris as a prospective juror due to her race in violation of *Batson* and its progeny. This claim is premised on the contention that the State violated Allen'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 prevents a prosecutor from using peremptory strikes to challenge potential jurors solely because of their race or on the assumption they will be unable impartially to 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, 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).

In determining whether a defendant has made the requisite showing of purposeful discrimination, the court should consider all relevant circumstances including, but not limited to, a pattern of strikes against black jurors, as well as 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—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).

Assuming, without so deciding, that Allen 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 Allen has not established a case of purposeful discrimination. We find no circumstances other than Ms. Harris’s race that would support a finding the State struck her solely based on her race. The prosecutor gave a clear and specific race-neutral explanation for the strike. She emphasized Harris’s occupation as a drug and alcohol counselor, as well as her own opinion concerning counselors’ beliefs and tendencies and the “leanings” a person in such an occupation might have which would render such a person partial to the defendant. Allen did not point to any questions or statements by the prosecutor during voir dire that evinced any intent to discriminate based on Ms. Harris’s race. Furthermore, the jury had been impaneled and sworn and the State had struck only one of the three prospective African-American jurors. Allen is thus unable to show any pattern of striking

African-American jurors. See *Knox*, 464 N.W.2d at 448 (holding that merely showing the State used a peremptory challenge to exclude the sole black juror falls short of even raising an inference of purposeful discrimination).

We conclude the trial court did not err in denying Allen's *Batson* challenge to the State's strike of Ms. Harris. We affirm on this issue. Because we have dealt with the court's denial of Allen's *Batson* challenge on the merits we do not address the State's preservation of error argument.

B. Sufficiency of the Evidence.

Our scope of review and many of the standards of review that apply in sufficiency-of-the-evidence challenges are set forth in *State v. Webb*, 648 N.W.2d 72, 75-76 (Iowa 2002), and need not be repeated here. The following additional standards are applicable as well. Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

The jury was instructed that in order to find Allen guilty of first-degree robbery the State had to prove, in part, that in carrying out the crime Allen was armed with a dangerous weapon. The jurors received the following instruction as to the definition of a dangerous weapon:

A "dangerous weapon" is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

This instruction is consistent with Iowa Code section 702.7 which defines a dangerous weapon as

any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.

Thus, the State may meet its burden of proof on the dangerous-weapon issue by showing that the board either fit the first half of the definition, i.e., that it was “designed primarily for use in inflicting death or injury,” or the second half of the definition, i.e., it was a “device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury . . . and . . . is capable of inflicting death upon a human being. . . .” See *State v. Greene*, 709 N.W.2d 535, 537 (Iowa 2006). Under the second part of Iowa Code section 702.7, the test is whether the device is used in such a way as to show an intent to kill or injure a person. *Id.*

Dangerous weapons, in fact, can encompass almost any instrumentality under certain circumstances.

Where the issue is whether an assault or a murder has been committed with a deadly weapon, it may be held that a stick, stone, hoe, or any one of many other instruments is a deadly weapon, according to the manner in which it is used, the determination of the lethal nature of the instrumentality being a question of fact for the jury.

Id. (quoting 79 Am.Jur.2d *Weapons & Firearms* § 1, at 5 (2002)). Here the trial court properly submitted the question of whether Allen was armed with a

dangerous weapon to the jury because “the instrument used [was] not one declared by statute to be a [dangerous] weapon[,] . . . its character, whether dangerous . . . or not, [was] doubtful, [and] its character depend[ed] on the manner in which it [was] used.” See *id.* (quoting 6A C.J.S. *Assault* § 156, at 379 (2004) with footnotes omitted).

The jury saw the board used by Allen and heard Heck’s testimony regarding his injuries from the board and the manner in which he received those injuries. It was then up to the jury to determine whether the six-inch-wide, twenty-four-inch long board with which Allen struck Heck in the back of the head during the robbery fit the definition of a dangerous weapon. We conclude the jury could reasonably find from the evidence before it that Allen used the board in a manner indicating he intended to inflict serious injury or death on Heck and that the board was capable of inflicting serious injury or death when used in the manner in which Allen used it. It could thus reasonably find the board was a dangerous weapon.

We note that the courts of this state have never expressly ruled on whether a board can be a dangerous weapon. However, several courts in other jurisdictions have determined a board can in fact be a dangerous or deadly weapon. We agree with those rulings and the rationale behind them. See *State v. Calhoun*, 776 So.2d 1188, 1191 (La. Ct. App. 2000) (holding that man wielding a large board was armed with a dangerous weapon); *Adams v. State*, 726 So. 2d 1275, 1278 (Miss. Ct. App. 1998) (finding sufficient evidence for jury to reasonably find board used to hit victim in the back of the head was likely to produce death or serious bodily injury and thus was a deadly weapon); *State v.*

Ayres, 464 N.W.2d 316, 321 (Neb. 1991) (holding jury could reasonably find that a 14" x 3" x 3/4" board used to beat a ten-year old child was capable of inflicting serious bodily injury and was thus a deadly weapon).

III. CONCLUSION.

We conclude Allen did not prove the State struck juror Harris due to her race. The juror was struck for a race-neutral reason and thus the district court was correct in denying Allen's *Batson* challenge. We further conclude there was sufficient evidence in the record for a rational jury to find the board used by Allen was a dangerous weapon and thus find him guilty of robbery in the first degree beyond a reasonable doubt.

AFFIRMED.