IN THE COURT OF APPEALS OF IOWA

No. 9-1002 / 08-1908
Filed February 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENYATTA HARLSTON SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Kenyatta Harlston Sr. appeals the judgment and sentence entered upon his conviction for second-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia A. Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Ralph R. Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Defendant Kenyatta Harlston Sr. appeals the judgment and sentence entered upon his conviction for second-degree murder. He contends the district court erred in failing to declare a mistrial or at least remove a particular juror, after a witness pointed out the juror as resembling a participant in the fight that led to the death of the victim. Additionally, Harlston contends his trial counsel was ineffective for failing to object to evidence that he refused police entry into the apartment where he was residing, for failing to object to the prosecutor's improper reasons for striking a prospective Hispanic juror, and for improperly advising Harlston not to testify in his own defense. Upon our review, we affirm Harlston's conviction and sentence and preserve his ineffective-assistance-of-counsel claims for further postconviction relief proceedings.

***I. Background Facts and Proceedings*.**

In the early morning hours of August 25, 2007, a racially charged fight broke out in Dubuque, Iowa, between Harlston and several of Harlston's friends and acquaintances, and Nic Blackburn and his friends and acquaintances. During the fight, Blackburn was fatally stabbed. Police were called to the scene, and Harlston and Harlston's friends Antonio "T-Bone" Dixon and Greg Buchanan ran to T-Bone's apartment. T-Bone and Harlston changed their clothes at the apartment.

Witnesses directed police to T-Bone's apartment. Police knocked on the apartment's door, and Harlston answered. The police asked if they could come inside, and Harlston told them "no." The police then asked the men to come to the police station, and the men agreed and went to the station voluntarily.

On September 4, 2007, the State filed a trial information charging Harlston with second-degree murder in violation of Iowa Code section 707.3 (2007) for Blackburn's death. Harlston raised a defense of justification or self-defense.

Jury selection for Harlston's trial commenced on September 16, 2008. During voir dire, the State and Harlston's trial counsel asked questions of many prospective jurors, including one prospective juror of Hispanic origin. The following exchange occurred during the State's voir dire of the prospective Hispanic juror:

> Q. Anybody else have [a scheduling issue], knowing that this [trial] will be two weeks? . . . A. I have—I go to [school at] Hawkeye.
>
> . . . .
>
> Q. Okay. And what's your schedule? A. Um, I go to school Monday through Friday, and I go like almost every other day.
>
> . . . .
>
> Q. Where do you get your news from? A. On T.V. mostly.
>
> Q. Okay. And what about your spare time? I know you're a student, but what do you like to do when you're not in school? A. I like to go shopping and—
>
> Q. Okay. And what about T.V.? What do you like? A. I like MTV.
>
> Q. Okay. Do you belong to any kinds of clubs at school, or—A. No. Not right now.

Harlston's trial counsel later conducted its voir dire of the prospective juror, and the following exchange occurred:

> Q. [A]s far as news is concerned, and I note the T.V., is it, what are you watching on T.V.? A. I watch *Family Matters*.
>
> Q. Okay. Okay. And are you fluent? A. Yes.
>
> Q. Yeah. Okay. I notice, I think you said you were in school? A. Yes. Hawkeye.
>
> Q. All right. What are you planning on doing with that? A. I'm—my major is in business.
>
> Q. And do you have any dreams or aspirations where that's going to lead you? A. No.
>
> Q. No. Do you have a lot of hours that you're taking out there? A. A couple.

> Q. Do you—are you reading anything, bookwise, other than what they're making up, not making—you want to read this, other than what you're reading at school? A. No.

At the end of voir dire, the State moved to strike the prospective juror, and Harlston raised a *Batson* objection to the State's strike of that prospective juror. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Harlston specifically objected to striking the prospective juror because the juror was the only juror of minority ethnicity. The State then enumerated its reasons for striking the prospective juror, explaining:

> [F]irst of all, her educational background. She is working part time and going to school part time. She was unable to articulate much about her school, when asked by both myself and [Harlston's trial counsel]. She gets her news from MTV. It's the only television that she watches, which is of concern to the State. I was also concerned with that she did—she had difficulties, when I asked about her classes, how often she went, and what, what hours she had, she had difficulty following me. Now, that may very well be my questioning, as opposed to her answering, her—bit it was of concern to me as well as, as her young age, and lack of experience.

Harlston's trial counsel responded: "I understand that those are legitimate concerns, Your Honor, and I think that's consistent with what she said. . . ." The court overruled Harlston's objection.

The matter proceeded to trial. Officer Brian Wullweber testified on direct examination by the State that he and another officer learned that T-Bone may have been involved in the incident, so they went to T-Bone's apartment to speak with T-Bone. The officer testified that after knocking on the door, Harlston answered the door. The following exchange occurred:

> Q. [W]hen you got to the door and made contact with Mr. Harlston, what occurred? A. [The other officer] asked if we

> could come into the apartment to speak with him, and he advised him, No, he couldn't come into the apartment.
>
> . . . .
>
> Q. [W]ho said you couldn't come in? A. Mr. Harlston.
>
> Q. What happened then? A. They were advised of the situation, why we were there to speak with them.
>
> Q. And what did you tell them? A. That there had been a stabbing in the area . . . and we were requesting to speak with them at the Dubuque Law Enforcement Center.
>
> Q. Okay. What happened then? A. All three of them [Harlston, T-Bone, and Buchanan], there were three in the apartment, were advised that they were not under arrest, and once again, we requested that they accompany officers to the Law Enforcement Center to speak with them, and they all advised that they—they would.

Harlston's trial counsel did not raise any objections during this exchange.

Later, Don Lochner testified on direct examination by the State that he observed the fight from his second-floor apartment's window, and the following exchange occurred:

> Q. [W]hat, if anything did you see . . . ? A. I just saw the fight. There was a—a white guy fighting, and it looked like his friends were trying to help him calm down or something, you know. The guy was just kind of irrational and carrying on.
>
> Q. Okay. And you saw him fighting? A. No, he wasn't actually fighting. He was just screaming at everybody, swearing, the arms were going around, and that sort of thing.
>
> Q. Okay. All right. And can you describe this white guy for us? A. It looks like the guy in the jury, on the last row.
>
> Q. Oh gosh. A. Why is that bad?
>
> Q. Well—A. Okay, I'll decide—
>
> Q. Can you tell us what he looked like, please? A. He was like five ten to six foot, I think he looked like blond hair, he had his shirt on, something called white wife beater shirt, one of these, and with a white top, and I remember seeing the whole thing was out in the center. His friends were trying to calm him down. They weren't working.

Thereafter, the jury was excused for a recess. Harlston's attorney moved for a mistrial, and the court overruled the motion, finding that witness's testimony was not sufficient to rise to the level of prejudice to Harlston in the proceeding. The

court stated it would admonish the jury about witness's identification. Harlston's counsel requested that the juror identified by the witness be made an alternate. The State resisted, but the court did not rule on the issue at that time. The court returned the jury to the courtroom and gave an admonition advising the jury to disregard the comparison identification that was made by the witness, stating the identification was not evidence and should not be used by the jury during its deliberations. The witness completed his testimony. After the court informed the witness that he could step down from the witness stand, the following exchange occurred:

> THE WITNESS: Sorry about my error.
> THE COURT: Sh. Ladies and gentlemen of the jury, once again, please disregard any comments made here at the end of this witness's testimony. They were not prompted by either counsel, and are not evidence for you to consider in your deliberations.

The State then continued its case-in-chief. At the close of the State's case and after the jury had been excused, Harlston renewed his motion for a mistrial, which the court denied. Harlston then requested that the juror identified by the witness be made an alternate, and the State objected. The court denied Harlston's request, finding that, upon observing the jury during the witness's comparison of the witness to the juror, the jurors did not seem offended by the comparison. The court also found that removing the juror would place a great deal of emphasis on what happened and denied Harlston's request.

Harlston did not testify at trial. Harlston's trial counsel stated "Mr. Harlston is opting not to testify. He understands that he does have a right to do so, and in discussions with us, we are choosing by way of trial strategy not to have him take the stand."

At the end of the trial, Harlston was found guilty as charged by the jury. He was sentenced to a prison term not to exceed fifty years. Harlston now appeals.

***II. Discussion*.**

On appeal, Harlston contends the district court erred in failing to declare a mistrial or at least remove the juror after Lochner pointed out the juror as resembling a participant in the fight which led to the death of the victim. Additionally, Harlston contends his trial counsel was ineffective for failing to object to evidence that he refused police entry into the apartment where he was residing, for failing to object to the prosecutor's improper reasons for striking an Hispanic juror, and for improperly advising Harlston not to testify in his own defense. We address his arguments in turn.

***A. Motion for Mistrial*.**

Harlston contends the court erred in denying his motion for mistrial. A trial court has broad discretion in granting or denying a motion for mistrial. *State v. Brotherton*, 384 N.W.2d 375, 381 (Iowa 1986). We review for an abuse of that broad discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). An abuse of discretion occurs when the district court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id*. An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *Id*.

> We find an abuse of discretion only when defendant shows prejudice which prevents him from having a fair trial. The trial court was in a better position to observe the matters complained of and to ascertain its effect, if any, on the jury.

Brotherton, 384 N.W.2d at 381 (internal citations omitted). In most circumstances, a curative instruction is sufficient to enable the jury to complete its task without being improperly influenced by otherwise prejudicial testimony. *State v. Williamson*, 570 N.W.2d 770, 771 (Iowa 1997). A mistrial is necessary only when the evidence was so prejudicial its effect on the jury could not be erased by an admonition. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). Only in extreme cases will a cautionary instruction be deemed insufficient to remove the danger of prejudice. *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988).

In our review of the record on this appeal, we find no abuse of discretion by the trial court in not granting Harlston's motion for mistrial. The court's admonition to the jury was sufficient to cure any prejudice that may have resulted. We therefore affirm on this issue.

B. Ineffective Assistance of Counsel.

Harlston next contends his trial counsel was ineffective for failing to object to evidence that he refused police entry into the apartment where he was residing, for failing to object to the prosecutor's improper reasons for striking a prospective Hispanic juror, and for improperly advising Harlston not to testify in his own defense. We conduct a de novo review of ineffective-assistance-of-counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

To establish ineffective assistance of counsel, a defendant must demonstrate by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). A defendant's inability to prove either prong defeats the claim of

ineffective assistance of counsel. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). Although we generally preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). However, only in rare cases will the trial record alone be sufficient to resolve the claim. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)). "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). In this case, we find the record is insufficient to address Harlston's ineffective-assistance-of-counsel claims on direct appeal. We therefore preserve his claims for possible postconviction relief proceedings.

***III. Conclusion*.**

For the foregoing reasons, we affirm Harlston's conviction and sentence, and we preserve Harlston's ineffective-assistance-of-counsel claims for further postconviction relief proceedings.

AFFIRMED.