STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1477

State of Minnesota,
Respondent,

vs.

Recardo Daryl Meeks,
Appellant.

Filed September 7, 2010
Affirmed
Ross, Judge

Hennepin County District Court
File No. 24-CR-08-23025

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Recardo Meeks appeals from his conviction of unlawfully possessing a firearm following an altercation at a Minneapolis nightclub. Meeks argues that he is entitled to a

new trial because the prosecutor's peremptory strike of an African-American potential juror was racially discriminatory and the prosecutor committed reversible misconduct by eliciting testimony from a police officer that the nightclub fight was gang-related. Because there was a valid, race-neutral reason for the peremptory strike and because the prosecutor committed no misconduct, we affirm.

FACTS

A downtown Minneapolis nightclub asked for police assistance as its staff was ejecting patrons from the club near bar-closing time. As one officer spoke with a nightclub bouncer about a fight that had just occurred, officers heard gunshots from behind the club.

Officers headed down a ramp toward the gunfire in the parking lot and through a crowd of approximately 30 fleeing people. Officer Mark Lanasa saw a man later identified as appellant Recardo Meeks crouching and then running with a gun in his hand. Officer Lanasa ordered Meeks to drop the gun and get on the ground, but Meeks crouched down behind a silver sedan. Officer Lanasa yelled to the other officers, "He's behind that car!" Meeks stepped from behind the car without the gun and with his hands up. Officer Lanasa did not see anyone else near the vehicle.

Meeks walked backward with his hands in the air toward another man, later identified as Meeks's friend, "Epps," who was bleeding from a head wound. Meeks got within ten feet of Epps and then followed police commands to lie on the ground. Officer Lanasa handcuffed Meeks, and Officer Michael Meath found the handgun beside the silver sedan where he had seen Meeks, pistol in hand, ducking down.

Officer Steven Lecy spoke with a valet. Just before the shots were fired, the valet had seen a man matching Meeks's description run up to a car and beat on the passenger's side window, trying to get inside. The valet recognized the owner of the car, a club regular, standing at the driver's side of the car, bleeding from his face. The man on the passenger's side eventually got inside and reached into the glove compartment. The valet believed that the man had grabbed a gun because he saw him pull back with his arm and heard two gun-like mechanical clicks, but he did not actually see a gun. The valet was running toward the club to report that there was a gun in the parking lot when he heard the gunshots.

Meeks was charged in Hennepin County with being an ineligible person in possession of a firearm and the case proceeded to trial. During jury selection, the prosecutor exercised a peremptory challenge to remove T.G. from the jury panel. T.G., like Meeks, is an African-American man. T.G. disclosed during voir dire that he had two drunk-driving convictions in 2004. He also disclosed a conviction of fleeing a police officer in 2005 and stated that Minneapolis police officers had assaulted him after they caught him. The prosecutor exercised one of her peremptory challenges to remove T.G. from the jury panel. Meeks raised a *Batson* objection, arguing that the peremptory strike was racially motivated. The district court overruled the objection.

During the trial, the state argued that the evidence established that Meeks had reacted to a fight behind the nightclub by running to the car and retrieving the handgun in an attempt to defend his injured friend Epps. The jury found Meeks guilty of being an ineligible person in possession of a firearm. This appeal follows.

D E C I S I O N

I

Meeks argues that the district court erred by denying his *Batson* objection to the state's peremptory strike. He maintains that the state's proffered race-neutral reason for striking T.G.—that he was assaulted by Minneapolis police—was a pretext for racial discrimination because African-American males are disproportionately subjected to excessive police force.

"Peremptory challenges allow a party to strike a prospective juror that the party believes will be less fair than some others and, by this process, to select as final jurors the persons they believe will be most fair." *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009) (quotation omitted). But the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutorial use of peremptory challenges to exclude otherwise qualified and unbiased persons from the jury solely by reason of race. *Batson v. Kentucky*, 476 U.S. 79, 84, 106 S. Ct. 1712, 1716 (1986); *State v. Gomez*, 721 N.W.2d 871, 883 (Minn. 2006). Whether racial discrimination motivated a peremptory challenge is a factual determination, and reviewing courts give great deference to the district court's decision unless it is clearly erroneous. *State v. Reiners*, 664 N.W.2d 826, 830–31 (Minn. 2003). "We afford great deference because the record may not reflect all of the relevant circumstances that the [district] court may consider." *Martin*, 773 N.W.2d at 101 (quotation omitted). If the district court's determination was clearly erroneous, and the prosecutor had a racially discriminatory intent or motive in striking a veniremember, a

defendant is automatically entitled to a new trial. *State v. DeVerney*, 592 N.W.2d 837, 844 (Minn. 1999).

A three-step analysis determines whether a peremptory challenge is based on racial discrimination. *Martin*, 773 N.W.2d at 101. The party objecting to a peremptory challenge must first make a prima facie case of racial discrimination. *Id*. If a prima facie case is made, the burden shifts to the opposing party to offer a race-neutral explanation for the peremptory challenge. *Id.* The district court must then decide whether the race-neutral explanation is a mere pretext for purposeful racial discrimination. *Id.*; *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (providing three-step process for evaluating claim that peremptory challenge was based on purposeful discrimination).

Meeks objected to the state's peremptory strike because, although T.G. "had gotten in trouble in the past," there were white veniremembers similarly situated and all the veniremembers indicated, like T.G., that they would not hold their own legal troubles against the prosecution. As the party making the *Batson* challenge, Meeks had to first establish a prima facie case of purposeful discrimination by showing that a member of a racial group has been peremptorily excluded from the jury and that the circumstances of the case raise an inference that race motivated the exclusion. *See Batson*, 476 U.S. at 96, 106 S. Ct. at 1723; *State v. Campbell*, 772 N.W.2d 858, 863 (Minn. App. 2009). The district court believed that Meeks made this showing, but we disagree. The state's removal of a racial minority, alone, does not establish a prima facie case of racial discrimination. *Reiners*, 664 N.W.2d at 831. There were three African-American veniremembers. The prosecutor challenged only one African-American veniremember

and used her remaining two peremptory challenges to remove white jurors. These circumstances do not suggest an inference that race motivated the prosecutor to remove T.G.

Even if Meeks had identified circumstances that suggested a racial motive for T.G.'s removal, the district court correctly held that the prosecutor provided a race-neutral explanation for the strike and that Meeks failed to prove discrimination. At the second step, the issue is the "facial validity of the prosecutor's explanation," and it will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. *State v. Martin*, 614 N.W.2d 214, 222 (Minn. 2000). The prosecutor's explanation does not have to be persuasive or even plausible so long as it is race-neutral. *Id.* "It is not until the third step that the persuasiveness of the justification becomes relevant." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995) (emphasis omitted). The prosecutor explained that she did not believe that T.G. would be an appropriate juror "because he felt that the Minneapolis Police Department when arresting him beat him and that they were wrong in doing that" and because he was prosecuted by the Hennepin County Attorney's Office, the same office prosecuting Meeks. These are race-neutral reasons for striking T.G. Meeks contends that the white veniremembers who had similar criminal histories were not struck. But the nonchallenged white veniremembers did not indicate the same bases for potential antipolice bias that T.G. asserted. While there were white veniremembers with drunk-driving convictions, none of them claimed to have been assaulted by police.

After the prosecutor presented her race-neutral explanation for the strike, Meeks also failed to carry his burden to demonstrate that the explanation was a pretext hiding an underlying motive to discriminate. *See Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005). This burden has two requirements: "(1) a demonstration that the proffered race-neutral reason is not the real reason for the strike and (2) a demonstration that the real reason was the race of the veniremember." *Id.* The district court should consider all of the relevant evidence and determine whether the defendant has proven that the prosecutor acted with discriminatory intent. *Martin*, 614 N.W.2d at 222. "[C]onsiderable deference must be given by a reviewing court to the trial court's finding on the issue of intent because the finding typically will turn largely on an evaluation by the trial court of credibility." *DeVerney*, 592 N.W.2d at 844.

Meeks's counsel argued simply that she did not see any reason for striking T.G. other than his race. The district court stated that it did see other reasons and found that "the race-neutral reasons are appropriate and justified." The district court observed that there were no other potential jurors with T.G.'s set of circumstances and that it did not believe that the strike was exercised "in any way based upon race but rather [T.G.'s] particular circumstances."

On appeal, Meeks offers a different argument for why the prosecutor's explanation for the strike, which Meeks now concedes is race-neutral "on its face," was actually a pretext for racial discrimination. Meeks asserts that African-American males have historically been subjected to disproportionate harassment and excessive force by the police and that "T.G.'s race was very likely the reason he was assaulted by police."

Therefore, argues Meeks, the state's reason for the strike—T.G.'s claim that he had been assaulted by the police—implicitly included T.G.'s race, and so this reason was essentially a pretext for racial discrimination. Meeks adds that because nonwhites are disproportionately subjected to police harassment or excessive force, allowing peremptory strikes because a prospective juror has been the victim of police harassment would disproportionately exclude racial minorities from jury service.

Neither the argument that the police assault was linked to T.G.'s race nor the disparate-impact argument was made to the district court. We generally only review issues presented to and considered by the district court, and a party cannot obtain review by raising the same general issue litigated under a different theory. *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007). We reject Meeks's arguments on that ground, but we observe that the supreme court rejected similar arguments in *Martin*. In *Martin*, the defendant argued that "excluding African Americans who have family members with criminal histories from juries would have a disparate impact on African-American participation in juries because African Americans are more frequently arrested and more often have criminal records because of the scrutiny they face from the predominantly white police force." 614 N.W.2d at 223. The supreme court held that a "disparate impact alone will not violate the principle of race neutrality, '[u]nless the [prosecutor] adopted a criterion with the intent of causing the impact asserted.'" *Id.* (alterations in original) (quoting *Hernandez v. New York*, 500 U.S. 352, 362, 111 S. Ct. 1859, 1867 (1991)). Meeks has not argued or cited to evidence showing that the prosecutor intended to cause the impact asserted—disproportionately excluding African-American men from jury

service. Meeks also fails to explain why the second reason the prosecutor offered for the strike, that T.G. had been previously prosecuted by the Hennepin County Attorney's Office, was a pretext for discrimination.

Meeks failed to establish that the prosecutor's peremptory strike of T.G. was racially discriminatory.

II

Meeks next argues that he was denied a fair trial because the prosecutor elicited prejudicial and irrelevant evidence that the fight in the nightclub was gang-related. Meeks did not object at trial to the prosecutor's question. A defendant who fails to object at trial generally waives the right to appellate review of a prosecutor's conduct. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). But this court has the discretion to review unobjected-to prosecutorial misconduct under a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). The plain-error test applied to prosecutorial-misconduct claims requires a defendant to show that there was error that was plain. *Id*. at 302. We would then determine whether the error had a likely impact on the verdict. *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). If we found plain error that affected Meeks's substantial rights, we would next decide "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *See Ramey*, 721 N.W.2d at 302.

We see no prosecutorial misconduct and therefore, no error. The prosecutor asked Officer Lecy about the pre-gunshot fight in the bar and the officer interjected a reference to gang involvement:

> Q: All right. And did you learn that there had been a fight in the bar?
> A: Correct.
> Q: All right. And what did you learn about that?
> A: That a rival gang had gotten in a fight with Epps and—
> Q: Can I just stop you there for a minute, Officer. So there had been a fight; is that correct?
> A: Yes.

The prosecutor interrupted and redirected the witness's description as soon as the witness referred to gangs. She did not ask the officer any more questions about the fight, and Officer Lecy did not make any more references to gangs. The judge requested a sidebar discussion with the attorneys, after which he gave a cautionary instruction to the jury that there was "no evidence being introduced in this case that this was a gang-related incident" and that jurors should not misinterpret the "inadvertent" and "lone statement" made by the witness.

As Meeks accurately highlights, it is improper for the prosecutor to elicit inadmissible testimony. *State v. Harris*, 521 N.W.2d 348, 354–55 (Minn. 1994). But the prosecutor did not intentionally elicit the improper testimony that the fight was gang-related. The district court expressly found that it was obvious that the prosecutor had not intended to elicit the gang reference.

We recognize that the prosecutor has a duty to prepare prosecution witnesses to avoid drawing out inadmissible testimony. But we see no basis to find error under the case Meeks chiefly relies on, *State v. Ray*, 659 N.W.2d 736, 745 (Minn. 2003). In *Ray*, the supreme court admonished the prosecutor for persistently asking leading questions seeking to elicit inadmissible testimony that the defense had successfully excluded from

trial through a successful motion in limine. 659 N.W.2d at 744–46. The prosecutor's conduct here does not approach the inappropriate actions taken by the prosecutor in *Ray*. We first observe that Officer Lecy was called as a witness by Meeks and was therefore not a state witness. The prosecutor nevertheless has a duty to avoid questions on cross-examination that she knows will lead to inadmissible testimony. *See State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). The question that led to the inadmissible testimony here was not of the sort that would knowingly draw the testimony. Given the context, the question, "[W]hat did you learn about [the fight in the bar]" would have logically drawn an answer about Meeks's friend being involved and injured, not about Epps's alleged gang affiliation. The prosecutor had no apparent reason to anticipate that Officer Lecy would make the gang reference. The prosecutor apologized to the district court for the officer's testimony and explained that she did not know that he would make a gang reference because it was not included in his report. This is quite innocent compared to the conduct in *Ray*, where the supreme court stated that "[f]ollowing the district court's order in limine to exclude [the challenged testimony], [the state's witness] should have been briefed by counsel to avoid that subject." 659 N.W.2d at 745. There was no order in limine or other notice here allowing the prosecutor to predict the testimony and warn the witness not to provide it. Also distinguishing this case from *Ray*, the prosecutor here did not persistently attempt to elicit inadmissible testimony. She did not attempt to elicit inadmissible testimony at all, and when the lone gang reference was made, she immediately stopped and redirected the testimony toward a different topic.

We can discern from the context of the prosecutor's questioning that she asked only proper questions to develop the theory of the state's case. Because the prosecutor committed no misconduct by asking the unobjected-to question about the fight, Meeks's prosecutorial-misconduct argument fails.

Affirmed.