**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 11, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-2524** **Cir. Ct. No. 90CF903681**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHARLES E. JACKSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Charles E. Jackson appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2001–02) motion for postconviction relief.[1] He

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

claims that: (1) his equal-protection rights were violated when the prosecutor used a peremptory challenge to strike the only African-American juror; and (2) the trial court erroneously exercised its discretion when it refused to strike another juror. Jackson also contends that his trial counsel was ineffective when he failed to object to these alleged errors, and his postconviction counsel was ineffective when he failed to raise all of these issues in the original postconviction motion. We determine that Jackson's substantive claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and only Jackson's claim of ineffective assistance of postconviction counsel survives.[2] Accordingly, we address the merits of each issue only as they pertain to his claim of ineffective assistance of postconviction counsel. We affirm.

I.

¶2 In 1990, Charles E. Jackson was charged with first-degree intentional homicide, as a party to a crime, while carrying a dangerous weapon, after Ricky Roundtree's body was found shot and burned in an abandoned building. *See* WIS. STAT. §§ 940.01(1), 939.05, 939.63(1)(a)2 (1989–90). Jackson pled not guilty and went to trial.

[2] Jackson also appears to allege that his appellate counsel was ineffective for failing to raise these claims on appeal. Wisconsin law distinguishes between postconviction and appellate counsel when addressing ineffective-assistance-of-counsel claims. A claim of ineffective assistance of appellate counsel is generally raised by filing a habeas petition with the appellate court that heard the appeal, *see* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992), while a claim of ineffective assistance of postconviction counsel is raised in the trial court either by filing a habeas petition or by WIS. STAT. § 974.06, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). Accordingly, because Jackson has pursued the latter option, we construe his claim as one for ineffective assistance of postconviction counsel.

¶3 At trial, Jackson testified that on October 13, 1990, he went to the Black Velvet Lounge with a friend, Patrick Harden. While they were at the bar, Harden told Jackson that Roundtree was "coming on to [him]." Jackson testified that, as a result, Harden and a third man named "Will" wanted to shoot Roundtree. The men left the bar and confronted Roundtree in the doorway of an abandoned building near the bar. Jackson testified that he had tried to take his gun away from "Will" and Harden, but that "Will" grabbed the gun and shot Roundtree twice. The men then went back to the bar, but returned to the vacant building a short while later. Jackson told the jury that when they got to the building, Harden fired three more shots at Roundtree to "make sure he [was] dead." Jackson admitted that he set a rag on fire so that the men could see, but denied that he set Roundtree on fire.

¶4 A jury found Jackson guilty and the trial court sentenced him to life in prison, with an initial parole-eligibility date of 2041. Jackson filed a WIS. STAT. RULE 809.30 motion for postconviction relief, alleging that the trial court erroneously exercised its discretion when it imposed his parole-eligibility date. The trial court denied Jackson's motion and Jackson appealed. We affirmed in an unpublished opinion, concluding that the trial court had considered the appropriate sentencing factors. *See* ***State v. Jackson***, No. 92-1047-CR, unpublished slip op. (Wis. Ct. App. Mar. 22, 1993).

¶5 In August of 2003, Jackson filed a *pro se* WIS. STAT. § 974.06 motion for postconviction relief. He claimed that: (1) his equal-protection rights were violated when the prosecutor used a peremptory challenge to strike the only African-American juror; and (2) the trial court erroneously exercised its discretion when it refused to strike another juror. Jackson also claimed that his trial counsel was ineffective when he failed to object to these alleged errors, and his

postconviction counsel was ineffective because he failed to raise these issues in Jackson's original postconviction motion.

¶6 The trial court denied Jackson's WIS. STAT. § 974.06 motion and Jackson appeals.

II.

¶7 WISCONSIN STAT. § 974.06(4) requires criminal defendants to raise all postconviction claims in one motion or appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 177, 517 N.W.2d at 160. Issues that have already been finally adjudicated, waived, or not raised in a proper postconviction motion, cannot be raised in a § 974.06 motion unless there is a "sufficient reason" for failing to raise them in the original motion. ***Id.***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162.

¶8 On appeal, Jackson renews his arguments that: (1) his equal-protection rights were violated when the prosecutor used a peremptory challenge to strike the only African-American juror; and (2) the trial court erroneously exercised its discretion when it refused to strike an allegedly impartial juror. Jackson's attorney did not raise these claims in his original motion for postconviction relief and Jackson does not allege a sufficient reason for the lawyer's failure to do so. Thus, they are barred. Jackson may avoid the procedural bar of WIS. STAT. § 974.06(4) and ***Escalona-Naranjo***, however, by alleging that postconviction counsel was ineffective for failing to present these issues. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996). He does so here. Accordingly, we address Jackson's claims under the two-part test for ineffective-assistance-of-counsel claims.

¶9 The familiar two-part test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687.[3]

¶10 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

*A.* ***Batson*** *Challenge*

¶11 First, Jackson alleges that his postconviction counsel was ineffective because he did not allege that Jackson's trial counsel was ineffective when the lawyer failed to object under ***Batson v. Kentucky***, 476 U.S. 79 (1986), to the prosecutor's use of a peremptory challenge to strike the only African-American juror. ***Batson*** recognizes that race-based peremptory challenges violate the equal

[3] We recognize that the standard for prejudice is different when a defendant claims that his or her lawyer was ineffective for failing to challenge the use of a peremptory strike based on race. In that situation, a defendant must show that had trial counsel made the objection, there is a reasonable probability that it would have been sustained and the trial court would have taken the appropriate curative action. ***Davidson v. Gengler***, 852 F. Supp. 782, 786–787 (W.D. Wis. 1994); ***State v. Taylor***, 2004 WI App 81, ¶¶15–17, No. 03-1509.

protection clause of the United States Constitution and establishes a three-step test when the issue is raised. ***Id.***, 476 U.S. at 89, 96–98. Although the ultimate burden of persuasion always remains with the defendant, the burden of production shifts during the respective steps of the test:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

***Hernandez v. New York***, 500 U.S. 352, 358–359 (1991) (plurality opinion) (citations omitted); *see also* ***State v. Lamon***, 2003 WI 78, ¶22, 262 Wis. 2d 747, 664 N.W.2d 607 (Wisconsin has adopted the ***Batson*** analysis). As part of the third step, the defendant may show that the reasons offered by the prosecutor are pretexts for racial discrimination. ***Lamon***, 262 Wis. 2d 747, ¶32.

¶12 We review the postconviction court's determination on discriminatory intent *de novo* because although it was also the trial judge, the trial took place approximately twelve years earlier and the judge, acting as the postconviction court, relied solely on the transcripts. *See* ***Holder v. Welborn***, 60 F.3d 383, 388 (7th Cir. 1995).

¶13 Neither party in this case disputes that W.T. was the only African-American member of the jury panel. During *voir dire*, W.T. told the court that it would be difficult for him to serve on a sequestered jury because he owned rental properties and received telephone calls about problems "all the time." W.T. later indicated that he felt that he would not be able to "sit in judgment" of another because of his conscience. During in-chambers questioning W.T. explained he did

not know if he could sit in judgment because his son was on parole for a drug conviction and "I think maybe this would be my son sitting in the same." W.T. told the court that he thought that he would be able to reach a verdict based on the evidence, but that he might have a problem when thinking about it later.

¶14 After W.T. left the judge's chambers, the prosecutor moved to strike him for cause. The trial court denied the motion and the prosecutor later used one of the State's peremptory strikes to remove him. After she had exercised the State's preemptory strikes, the prosecutor explained in open court:

> Your Honor, I just wanted to make a record regarding some of my strikes. As the Court may remember, during the time of the individual voir dire there were two jurors who indicated that they would have a hard time or some problem with this case who were not struck for cause. One of them was Mrs. G.K. and the other was W.T.
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> ….
>
> Mr. T. also indicated that he would have -- he was the only juror who indicated that he would have a problem with his conscience[;] as a reason of conscience could not sit in judgment of others. He also told us that his son was on parole and he felt that his son has problems of -- that he had problems of his own and that he felt that his son -- that he may look at the defendant as if he were his son or [at] some point may do that. After further questioning he also indicated that his son had been convicted and was on parole for possession with intent to deliver. And that he felt that maybe not during the jury deliberation but later may come back and he may have a problem with his conscience. Based on his saying that he would have some problems with this and although he indicated he thought he could be impartial, that was the reason for my striking Mr. [T.]. He also indicated that he had some personal problems with regard to his business and didn't know yet whether or not he would have somebody to take care of his rental properties, but the main reason for my strike of him was his problems of conscience. As the Court remembers, I asked to strike for cause because of that.

The trial court then gave Jackson's lawyer a chance to respond. The lawyer told the court that he did not believe that race was a factor in the prosecutor's strike: "I can say categorically, Your Honor, that I do not believe that race was a factor in her decision." The trial court did not make a ruling on this issue because there was no objection from Jackson's lawyer.

¶15 When a prosecutor offers a race-neutral explanation for a peremptory challenge without disputing whether the defendant made a *prima facie* showing that the challenge was based on race and the trial court has ruled on the ultimate question of intentional discrimination, that issue becomes moot. ***State v. King***, 215 Wis. 2d 295, 303, 572 N.W.2d 530, 533 (Ct. App. 1997). Because the prosecutor provided an explanation for the strike and the trial court never ruled on the issue of whether Jackson made a *prima facie* case, we shift our analysis to the second and third steps of the ***Batson*** analysis.

¶16 As we have seen, under the second step of ***Batson***, the burden shifts to the prosecutor to articulate a race-neutral reason for striking the juror. ***Batson***, 476 U.S. at 97. The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand. ***Id.*** at 98, n.20. Unless discriminatory intent is inherent in the prosecutor's explanation, "the reason offered will be deemed race neutral." ***Hernandez***, 500 U.S. at 360.

¶17 In this case, the prosecutor offered a legitimate race-neutral explanation for striking W.T. She explained in open court that the main reason she struck W.T. was because he would have a "problem[] of conscience" and that "he may look at the defendant as if he were his son." This concern was clearly based on facts from the record. As we have seen, during *voir dire*, W.T. specifically told the court that he could not sit in judgment of another because his

son was on probation for a drug offense and he might see his son in the defendant's position. The prosecutor's explanation was thus clear, reasonably specific, and related to this case. *See, e.g.*, ***Lamon***, 262 Wis. 2d 747, ¶81–82 (peremptory strikes based on a familial relationship to individuals involved in the criminal justice system permissible) (collecting cases).

¶18 Jackson argues, however, that the prosecutor's reason for striking W.T. was a pretext for racial discrimination. He points out that the prosecutor failed strike several other allegedly biased panel members, including: (1) a juror who indicated that her niece and nephew were police officers; (2) a juror who told the court that he was a teacher at a high school where one of the State's witnesses was a part-time coach; and (3) a potential juror who indicated that she might be biased against African-Americans because her brother and his fiancé had been robbed and his fiancé raped by African-Americans.[4] Jackson thus claims that this evidence "shows a[] racially motivated discriminatory practice in the manner [in] which the prosecutor used her peremptory strikes." We disagree.

¶19 "A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic." ***Coulter v. Gilmore***, 155 F.3d 912, 921 (7th Cir. 1998). In this case, a comparative analysis does not reveal racially discriminatory reasons for the prosecutor's dismissal of W.T. As we have seen, the prosecutor struck W.T. primarily because he indicated that he would have a problem judging others. Jackson does not allege, and our review of the record does not reveal, however, that any of the jurors the prosecutor

[4] The first two panel members served on the jury. The third panel member was struck for cause.

failed to strike indicated that they would have a problem judging others. Without more, Jackson fails to establish that the prosecutor's reason for striking W.T. was a pretext. Thus, Jackson's postconviction counsel was not deficient for failing to raise this issue in Jackson's original postconviction motion.

*B. Impartial Juror*

¶20 Second, Jackson claims that his trial counsel was ineffective because the lawyer failed to strike another juror.

> Article 1, § 7 of the Wisconsin Constitution, guaranteeing an impartial jury, and the Sixth and Fourteenth Amendments to the United States Constitution, guaranteeing an impartial jury and due process, require that a criminal not be tried by a juror who cannot comprehend the testimony. It is logical to conclude that implied in the concept of assuring an impartial jury is the presence of jurors who have heard all of the material testimony. The absence of this condition, whether it is due to a hearing deficiency or a state of semi-consciousness, could imperil the guarantees of impartiality and due process.

***State v. Hampton***, 201 Wis. 2d 662, 668, 549 N.W.2d 756, 758 (Ct. App. 1996) (citation and footnote omitted).

¶21 In this case, a potential juror, T.S., told the court that he sometimes became drowsy as a result of medication that he took following open-heart surgery. He explained that "it doesn't happen all the time …, [but] sometimes my memory is real short since I had this done…. I can remember things and then all of a sudden I'll think what did he say. It's real crazy, comes and goes on me." The trial court told T.S. to let the court know if he felt drowsy during the trial and the court would take a short recess. T.S. agreed and neither lawyer objected.

¶22 Jackson claims that his trial counsel should have moved to strike T.S. because T.S. "was incapable of basing his verdict upon the evidence at trial,

evidence which was unlikely to be fully heard and remembered because [T.S.'s] memory would be blanking in and out." Johnson fails to show, however, how he was prejudiced. He does not point to anything in the record indicating that T.S. asked for accommodations during the trial or that his condition interfered with his ability to remember and understand what was going on during the trial. *See* ***State v. Guzman***, 2001 WI App 54, ¶15, 241 Wis. 2d 310, 624 N.W.2d 717. Thus, Jackson's postconviction counsel was not ineffective for failing to raise this issue in Jackson's original postconviction motion.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.