COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP3184-CR
2008AP3185-CR

Cir. Ct. Nos. 2001CF2195
2001CF2246

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE T. CROWDER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and KEVIN E. MARTENS, Judges. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Andre T. Crowder appeals from an amended judgment and a judgment of conviction for a variety of offenses, and from a

consolidated postconviction order denying his motion for a new trial.[1] The issue is whether the prosecutor's four stated reasons, one of which was a gender-related consideration, for exercising a peremptory strike in response to Crowder's timely objection on the basis of race, allows an otherwise untimely objection to the use of that same peremptory strike on the basis of gender. We conclude that Crowder waived his belated gender-based objection to the prosecutor's use of a peremptory strike notwithstanding his timely albeit unsuccessful racially-based challenge. Therefore, we affirm.

¶2 A jury found Crowder guilty of possessing over 100 grams of cocaine with intent to deliver, second-degree recklessly endangering safety, operating a vehicle without the owner's consent, intentionally fleeing from an officer, and possessing a firearm as a felon, each as a habitual criminal.[2] The trial court imposed an aggregate sentence of twenty-nine years of initial confinement and fourteen years of extended supervision. Crowder moved for a new trial, contending that the prosecutor removed a prospective juror because of her gender. The basis for Crowder's gender-based objection was taken from one of the prosecutor's four race-neutral reasons for striking that same prospective juror when timely challenged on the basis of race. The trial court denied the motion, ruling that Crowder waived this gender-based objection. Crowder appeals.

[1] The Honorable William Sosnay presided over the jury trial and imposed sentence in these cases. The Honorable Kevin E. Martens decided Crowder's consolidated postconviction motion.

[2] The cases underlying these appeals were consolidated for trial and sentencing. All of these convictions, except possessing a firearm as a felon, were in the case underlying Appeal No. 2008AP3184-CR; the firearm conviction was in the case underlying Appeal No. 2008AP3185-CR.

¶3 During the voir dire phase of the jury trial, Crowder raised a ***Batson*** objection to the prosecutor's use of a peremptory strike to remove an African-American woman from the panel of prospective jurors. *See* ***Batson v. Kentucky***, 476 U.S. 79, 86 (1986). The prosecutor explained his race-neutral reasons for removing this prospective juror as follows:

> [Crowder's trial counsel] felt it was important in this case to know whether people had driver's licenses. [This prospective juror] indicated that she does not have a driver's license which would indicate either she's lost her license for some reason or has never had one. So that was a factor.
>
> She indicated – One of the few individuals on the jury – indicated she was not at all familiar with Highway 41. She indicated she was single as opposed to married. Generally, I prefer if there is a choice between single or married generally married. Not always, but I think they have more experience, more connection to the community or settled in their views and experience and also because of just the general make up of the jury. I like to have somewhat of a balance between men and women and in this particular case we had quite a few more women on the jury than men and she is a woman so that was another reason.
>
> So those were the non-racial reasons that I chose to strike [that prospective juror].

The trial court overruled Crowder's ***Batson*** objection.

¶4 Crowder then filed a consolidated postconviction motion for a new trial, contending for the first time that the prosecutor's exercise of a peremptory strike to remove that same prospective juror was gender-based.[3] *See* ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 144-45 (1994) (prohibits intentional

[3] Crowder also raised an unrelated challenge that he does not pursue on appeal.

discrimination on the basis of gender). The trial court denied the motion, ruling that Crowder's gender-based objection was untimely and therefore waived.

¶5 Crowder waived this challenge by failing to timely object to the prosecutor's peremptory strike on the basis of gender. *See* ***State v. Jones***, 218 Wis. 2d 599, 601-02, 581 N.W.2d 561 (Ct. App. 1998). A timely objection to the use of a peremptory strike must be raised "before the jury is sworn." ***Id.*** at 602. We addressed this issue in ***Jones***, and held that a party's failure to timely object results in waiver. *See* ***id.*** at 600. We reasoned that:

> First, this procedure will promote the efficient and economic administration of justice. It will allow the trial court to promptly address the issue and make any necessary decisions without great disruption to the process of impaneling a jury. When no objection is made until after the jury is sworn, the possibility for an immediate remedy for unconstitutional action has been lost. Second, the early objection assists the defendant, opposing counsel and the trial court by making an objection while the parties' and the trial court's recollections of the voir dire questioning are still fresh. This will help the trial courts and parties achieve the fairest and most appropriate result. Third, our holding creates a "bright-line" test that is easy to follow.
>
> Finally, our decision is in accord with the majority of courts that have addressed this issue.

Id. at 602.

¶6 Crowder contends that waiver does not apply because his timely ***Batson*** objection preserved the record of the prosecutor's reasons for exercising a peremptory strike. Crowder contends that the prosecutor's reasons for striking this same prospective juror, while not racially motivated, evinced a gender bias.

¶7 In response to Crowder's ***Batson*** objection, the prosecutor mentioned that he "like[s] to have somewhat of a balance between men and

women and in this particular case we had quite a few more women on the jury than men and [this prospective juror] is a woman so that was another reason [to strike her]." The significance of seeking a gender-balanced jury was never explored because the timely objection was to race, not to gender.[4] The record is insufficient to determine whether the removal of that prospective juror was "motivated in substantial part by discriminatory intent."[5] ***Snyder v. Louisiana***, 552 U.S. 472, 485 (2008).

¶8 Crowder's timely albeit unsuccessful ***Batson*** objection to the prosecutor's peremptory strike does not salvage his belated objection to the removal of this same prospective juror for an entirely different reason because the principal concerns we addressed in ***Jones*** are not alleviated, namely, the trial court remains deprived of the prompt opportunity to immediately remedy the issue without disrupting jury selection. *See* ***Jones***, 218 Wis. 2d at 602. Crowder contends that the record is sufficient as is; he claims that "[w]e know all we need to know about the prosecutor's reasons for the strike." The trial court disagreed when it ruled that "[t]he absence of a record in this case precludes a finding that gender-based discrimination occurred, or that the defendant was prejudiced in any way." Crowder seeks to limit the record from which the court must determine whether the prosecutor's peremptory strike was "motivated in substantial part by

[4] The prosecutor's expressed reason, albeit in response to a *race*-based objection, was that he was seeking "a balance between men and women." The absence of a timely *gender*-based objection precluded further exploration of the prosecutor's motive and reasons in that regard.

[5] Crowder contends that our decisions in ***State v. King***, 215 Wis. 2d 295, 301, 572 N.W.2d 530 (Ct. App. 1997), and ***State v. Jagodinsky***, 209 Wis. 2d 577, 583-84, 563 N.W.2d 188 (Ct. App. 1997), support his position. In ***King*** and ***Jagodinsky***, unlike in this case, the defense objections were timely raised, affording the court a complete record on which to decide the merits of the objection.

discriminatory intent [on an entirely different basis than the discrimination alleged when the record was made]," while contending that he has also proven "purposeful discrimination." *See* ***Snyder***, 552 U.S. at 485; ***State v. King***, 215 Wis. 2d 295, 301, 572 N.W.2d 530 (Ct. App. 1997). We decline to decide the merits of a challenge on which there is a limited record, particularly when the reason the record is limited is because Crowder's gender-based objection to the removal of this prospective juror was untimely. *See* ***Jones***, 218 Wis. 2d at 601-02.

By the Court.—Judgments and order affirmed.

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