COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2278-CR **Cir. Ct. No. 2011CF18**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD L. SMART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Edward Smart appeals a judgment of conviction for operating while revoked and eighth-offense operating while intoxicated and an order denying his motion for postconviction relief. Smart argues he received ineffective assistance of counsel for several reasons, the trial court erroneously

failed to strike a juror for cause, and he should receive a new trial in the interest of justice. We reject Smart's arguments, and affirm.

BACKGROUND

¶2 Smart, a Native American, was convicted following a jury trial. During jury selection, defense counsel asked the court to inquire whether there were any Native Americans on the panel. Only prospective juror DeFoe indicated a Native American heritage. Also, the State inquired whether anyone had "ever been the victim of a crime?" After a silent pause and an additional comment by the State, DeFoe responded, "Oh, yeah, I have." The following exchange ensued:

> PROSECUTOR: Mr. DeFoe.
>
> JUROR DEFOE: I have a driving intoxicated. I have.
>
> PROSECUTOR: Oh, you had a driving intoxicated.
>
> JUROR DEFOE: Yeah, that's quite awhile ago.
>
> PROSECUTOR: Many years ago. When I said that this case was going to deal with driving while intoxicated, do you think that that would affect the way that you would look at this particular case.
>
> JUROR DEFOE: Gee, I don't know one way or the other. I don't know if it would or wouldn't.
>
> THE COURT: Sir, are you going to make a decision based on the facts in this case?
>
> JUROR DEFOE: Right. Yeah.

The State then asked the entire panel whether they, friends, or relatives had been charged with operating while intoxicated. Numerous panel members raised their hands. The State addressed each of them individually, asking whether they felt the defendants had been treated fairly in the respective cases. DeFoe responded, "I guess so. I got what I deserved, I guess." The State subsequently utilized a

peremptory challenge to remove prospective juror DeFoe. In his postconviction motion, Smart argued his counsel was ineffective for failing to challenge whether the State struck DeFoe for a racially neutral reason.

¶3 Also during jury selection, one of the potential jurors acknowledged she held a credibility bias in favor of law enforcement testimony. She then explained her spouse was a retired police chief, and the following exchange occurred:

> THE COURT: All right. Ma'am, will that fact cause you to not be able to make a decision based on the facts as presented?
>
> JUROR LEE: To be honest, a little bit.
>
> THE COURT: Will you honestly listen to the facts and make a decision?
>
> JUROR LEE: Yes.
>
> THE COURT: Thank you.
>
> [DEFENSE COUNSEL]: Would you take that into account that you might, hmm, be a little bit more on the side of the police officer because he's testifying during the trial?
>
> JUROR LEE: (Nodding head [affirmatively].)

Smart's attorney then requested that prospective juror Lee be removed for cause, and the court declined. Smart subsequently utilized a peremptory challenge to remove Lee. In his postconviction motion, Smart argued the court erroneously refused to strike Lee.

¶4 During trial, the State called Smart's girlfriend, Yvette King, as a witness. The State asked if she called the sheriff's department the morning after the vehicle accident. King stated she had, and had also called the district attorney's and public defender's offices to tell everybody she was driving, not

Smart. The State asked whether she told the sheriff's department that Smart left a party with two other people. King repeatedly responded that she did not recall the content of her various phone calls, but that, "If I did, I was probably still a little bit drunk. I don't really remember." The State told King that the sheriff's department records phone calls, and King stated she had "no reason not to believe" the State when it asserted she told the sheriff's department that Smart left with two people. The transcript itself was not introduced at trial.

¶5 The State did not disclose or provide a copy of the phone recording of King's call to Smart's attorney prior to trial, and only sent a transcript on the eve of trial. Smart argued in his postconviction motion that his counsel was ineffective for failing to object to the tardy disclosure and request either a continuance or exclusion of evidence concerning the phone recording.

¶6 Smart also argued his counsel was ineffective for failing to object during closing argument to what Smart asserts were the prosecutor's "racial inferences that implied that Native Americans were untruthful." In its closing argument, the State criticized Smart's witnesses by questioning how they all remembered the seating arrangement when King and Smart left the party. The State argued the only way they could remember something like that after the fact was because they were told it needed to be that way. The prosecutor then stated, "And then you get a couple of people to come who are at a party and related and know you, and they're your friends, you get them to come up and say, hey, this is what I saw." The court denied Smart's postconviction motion, and he now appeals.

DISCUSSION

¶7 Smart first argues his trial counsel was ineffective for failing to object when the State exercised a peremptory challenge to remove the only Native American on the jury panel. A defendant claiming ineffective assistance of counsel must prove both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. If a court determines a defendant has not proven one prong of this test, it need not address the other. ***Strickland***, 466 U.S. at 697. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶8 The State has a right to exercise peremptory strikes for any reason related to its view of the case outcome. ***State v. Lamon***, 2003 WI 78, ¶25, 262 Wis. 2d 747, 664 N.W.2d 607. However, it violates the Equal Protection Clause to "'challenge potential jurors solely on account of their race or on the assumption that [Native American] jurors as a group will be unable impartially to consider the State's case against a [Native American] defendant.'" *See* ***id.***, ¶¶25, 28 n.5 (quoting ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986)); *see also* ***State v. Snow***, No. 2012AP2323, unpublished slip op. (WI App Apr. 4, 2013) (State's removal of Native American potential juror was impermissible).

¶9 We employ the three-step ***Batson*** test for determining whether the State's peremptory strikes were permissible. ***Lamon***, 262 Wis. 2d 747, ¶27. First, the defendant must make a prima facie showing of discriminatory intent. If this showing is made, the burden shifts to the State to give a neutral explanation for challenging the dismissed juror. ***Id.***, ¶29. The explanation must be "clear, reasonably specific, and related to the case at hand." ***Id.*** However, the explanation need not rise to the level of justifying a strike for cause, or be persuasive or plausible. ***Id.***, ¶31. Even a silly or superstitious reason may satisfy the second step if it is facially nondiscriminatory. ***Id.*** Third, the trial court must weigh the credibility of the testimony and determine whether purposeful discrimination has been established. ***Id.***, ¶32. The defendant has the ultimate burden of persuading the court that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination. ***Id.*** "Therefore, it is at this [third] step that the issue of persuasiveness and plausibility of the prosecutor's reasons for the strike become relevant, and 'implausible or fantastic justifications may be found to be pretexts for purposeful discrimination.'" ***Id.*** (quoting ***Purkett v. Elem***, 514 U.S. 765, 768 (1995)).

¶10 Ultimately, whether a peremptory strike had discriminatory intent is a question of fact decided by the trial court. ***Id.***, ¶¶41, 45. That court is in the best position to determine the credibility of the State's race-neutral reason. ***Id.***, ¶42. Accordingly, the general rule is that the clearly erroneous standard of review applies at each step of the ***Batson*** analysis. ***Lamon***, 262 Wis. 2d 747, ¶¶45, 55.

¶11 Smart argues the State failed to identify a race-neutral reason for removing DeFoe from the jury, given that the State failed to also remove another prospective juror, Mosconi, who was white and also had a prior OWI conviction. Smart further argues the trial court erroneously failed to conduct a ***Batson*** analysis

when denying his postconviction motion. Citing ***Snyder v. Louisiana***, 552 U.S. 472 (2008), Smart asserts the court should have compared DeFoe's voir dire responses with those of Mosconi. While we agree the court's analysis was insufficient, we nonetheless conclude Smart was not prejudiced by his attorney's failure to challenge the State's removal of DeFoe from the jury.

¶12 At the postconviction motion hearing, the prosecutor (who apparently also appeared on the State's behalf at trial) did not respond to Smart's assertions that Mosconi should also have been struck if the reason for striking DeFoe was his prior OWI conviction.[1] Nor did the prosecutor explicitly state why DeFoe was selected for removal. However, the prosecutor did emphasize that another of the State's peremptory challenges was exercised against potential juror Brunello, whose close relative had a prior "OWI related issue." The prosecutor then asserted, "The State feels that there was adequate reason for striking … Ms. Brunello and, also, Mr. DeFoe under the circumstances …." On this basis, the court held:

> I'm … finding that the strikes which the State made were made because of involvement with alcohol and for no other reason. The Court inquired at the request of [defense trial counsel] whether there was [sic] Native Americans, and there was one person who answered in the affirmative, but, also, that [the prosecutor] found that his previous conviction for OWI was a reason to strike, and I don't find that as being prejudicial.

¶13 Because the court found that DeFoe was removed for a race-neutral reason, a ***Batson*** challenge at trial would, ultimately, have failed. Thus, Smart

[1] The prosecutor was not called to testify.

suffered no prejudice from his trial counsel's failure to raise the ***Batson*** issue. *See* ***State v. Taylor***, 2004 WI App 81, ¶17, 272 Wis. 2d 642, 679 N.W.2d 893.

¶14 We further conclude that the trial court's finding was not clearly erroneous. As the State now argues, a review of the trial transcript reveals DeFoe and Mosconi were not identical with regard to the OWI issue. When asked whether his prior OWI conviction would affect his view of the present case, DeFoe replied that he did not know. When asked whether he felt he was treated fairly in his OWI case, DeFoe responded, "I guess so. I got what I deserved, I guess." In contrast to DeFoe's equivocal responses, when Mosconi was asked whether he was "treated fairly or not fairly," he simply responded, "Fairly." Considering these responses, it would be reasonable for the prosecutor to infer that DeFoe's perception of the case could be negatively swayed by his prior OWI experience, while Mosconi's would not.[2] That inference is even stronger considering that CCAP records indicated Mosconi's case, a second-offense OWI, had been dismissed by the same prosecutor appearing in this case. Thus, the record supports the trial court's factual determination that DeFoe was struck for a race-neutral reason.

¶15 Smart next argues the trial court erred when it failed to strike potential juror Lee for cause when she acknowledged a bias in favor of law enforcement testimony. The State responds that Lee's responses were equivocal, therefore not requiring removal for cause. The State relies on ***State v. Czarnecki***, 2000 WI App 155, 237 Wis. 2d 794, 615 N.W.2d 672. That case, however, is not

[2] The State additionally asserts that DeFoe's responses indicated he believed he had been victimized in his OWI case. The record suggests it is more likely DeFoe was merely not paying close attention to, or misinterpreted, the prosecutor's question during voir dire.

on point. First, Lee's responses were not equivocal, and the trial court's brief, poorly worded inquiry did little to rehabilitate her. Second, in ***Czarnecki***, the court considered the juror's conflicting statements and "concluded [the juror] was not biased and would keep an open mind." ***Id.***, ¶23. We held that the trial court's finding was not clearly erroneous. ***Id.*** Here, however, the court made no factual determination. Rather, the court denied Smart's request without explanation:

> DEFENSE COUNSEL: Okay. Your Honor, I would ask that she be excused.
>
> THE COURT: No.

¶16 Nonetheless, we reject Smart's request for a new trial. Even assuming Lee was subjectively biased and should have been stricken for cause, Smart fails to fully develop his argument. Smart's own brief explains:

> In ***State v. Lindell***, [2001 WI 108,] 245 Wis. 2d 689, 746-47, 629 N.W.2d 223[], the Wisconsin Supreme Court held that if a defendant uses some of his statutorily provided peremptory strikes to correct trial court failures to remove biased jurors, and if the loss of such peremptories affects his substantial rights, he is entitled to a new trial.

¶17 In ***Lindell***, the court determined a prospective juror was "biased and should have been struck for cause." ***Lindell***, 245 Wis. 2d 689, ¶41. Yet, the court affirmed Lindell's conviction. ***Id.***, ¶7. The court overruled prior case law that held an erroneous failure to strike a biased juror for cause required automatic reversal. ***Id.***, ¶¶5, 51-53. Following ***Lindell***, when a trial court erroneously fails to strike a biased juror, a reviewing court must "evaluate whether the error has affected the [defendant's] substantial rights." ***Id.***, ¶111. "The substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error." ***Id.***, ¶113.

¶18 Smart asserts only that he "was unable to use his strike on another juror due to his having to use it to keep a biased juror off the jury." Without more, this is insufficient to warrant granting Smart a new trial. *See* ***id.***

¶19 Smart next argues his trial counsel was ineffective for failing to object to the State's tardy disclosure of the audio recording transcript of Smart's girlfriend, King, and to request either a continuance or exclusion of evidence.[3] The State is obligated to disclose certain evidence upon demand, including a list of witnesses it intends to call at trial and "any relevant written or recorded statements" of all witnesses named on such a list. WIS. STAT. § 971.23(1)(d)-(e).[4] Here, Smart's attorney made a discovery demand, and King was on the State's witness list.[5]

¶20 As remedies for a disclosure violation, a trial court may exclude evidence, grant the opposing party a recess or continuance, and/or advise the jury

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[3] Smart also sets forth the legal standard applicable to a challenge under ***Brady v. Maryland***, 373 U.S. 83 (1963). Smart does not, however, assert the withheld evidence was favorable to him, much less develop any ***Brady*** argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (issue raised but not briefed or argued is deemed to be abandoned).

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[5] The State asserts it was not required to disclose the recording because King was not on the witness list. She was, however, on Smart's witness list, and the State's list included "[a]ll witnesses named by the Defense."

The State further asserts it did not know whether King was the woman on the recording. That assertion is not supported by record citation, and the trial transcript demonstrates the State, at the very least, presumed it was King. That the prosecutor asked King the foundational question at trial whether she made the call does not suggest the prosecutor did not, in fact, already know the answer. Further, if King's testimony—that she called both the sheriff and district attorney to report that she was the driver—is accepted, then the State would have known the caller's identity. Neither the transcript nor recording are in the record.

of any failure to disclose or untimely disclosure. WIS. STAT. § 971.23(7m). The less drastic and more favored remedy for the State's violation of the criminal discovery statute is for the circuit court to grant a continuance or recess. ***Tucker v. State***, 84 Wis. 2d 630, 640-41, 267 N.W.2d 630 (1978). Whether the State has violated the discovery statute presents a question of law subject to de novo review. ***State v. Harris***, 2008 WI 15, ¶96, 307 Wis. 2d 555, 745 N.W.2d 397. A trial court's decision as to remedies is discretionary, and is reviewed under the erroneous exercise of discretion standard. ***Id.***

¶21 The State plainly violated the disclosure statute by withholding the phone transcript until the eve of trial. Smart raises this issue under the ineffective assistance of counsel rubric. Therefore, he must demonstrate he was prejudiced by his attorney's failure to object and request a remedy for the tardy disclosure. Smart, however, offers nothing but conclusory statements. He makes sweeping statements of prejudice without actually demonstrating any. The following is Smart's entire prejudice argument:

> Had defense counsel had the transcript timely, he could have investigated the matter prior to trial or even obtained a copy of the recording of which the transcript was made.
>
> Mr. Smart was prejudiced by his counsel's inability to prepare for the contents of the transcript prior to trial. He was also prejudiced by his counsel's failure to ensure that the contents of the transcript would not go before a jury by requesting the court to preclude it in a motion in limine. Mr. Smart was also prejudiced by his counsel's failure to investigate as to the contents of the transcript or to request a continuation of the trial.

¶22 Smart has a copy of the transcript. Because he fails to explain how the trial outcome was affected by his attorney's failure to object, his ineffective assistance argument is inadequately developed. *See* ***State v. Flynn***, 190 Wis. 2d

31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We may reject arguments that are inadequately briefed.). As the State argues, Smart does not explain why he needed the transcript or recording to prepare for trial, or what would have changed in his preparation. Smart concedes this argument by failing to reply. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶23 Next, Smart argues trial counsel was ineffective for failing to object to what he asserts was a suggestion by the State that Native Americans are not credible. During closing argument, the prosecutor stated, "And then you get a couple of people to come who are at a party and related and know you, and they're your friends, you get them to come up and say, hey, this is what I saw."

¶24 Smart's attorney was not ineffective; any objection to the State's statement would have been overruled. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("An attorney is not ineffective for failing to pursue a meritless objection."). Nothing about the statement remotely suggests racial bias. In fact, some of the witnesses were actually related. The party Smart attended prior to his accident was for King's brother's naming party. King described it as a get-together with family and friends. The party was at the house of King's mother, who also testified on Smart's behalf. We agree with the State: "Smart's assertion is completely absurd."

¶25 Finally, Smart seeks a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. Smart relies on the combined weight of the issues addressed above. We have already determined the arguments individually fail, and we are not convinced that the combined weight of the judicial, prosecutorial, and defense errors justifies the use of our discretionary power of reversal. *See* ***State v.***

Bannister, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892 (we exercise our power of discretionary reversal only in exceptional cases).

By the Court.—Judgment and order affirmed.

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