COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1419-CR **Cir. Ct. No. 2010CF003469**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN T. WINSTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, DAVID L. BOROWSKI, and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Justin T. Winston appeals from a judgment of conviction for one count of first-degree intentional homicide as a party to a crime

and one count of being a felon in possession of a firearm, contrary to WIS. STAT. §§ 940.01(1)(a), 939.05, and 941.29(2) (2009-10).[1] Winston also appeals from the denial of two postconviction motions.[2] On appeal, Winston argues that "the trial court erred when it decided that there was no ***Batson*** violation at the jury trial and when it denied [the] postconviction motion on this issue."[3] *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). Winston also argues that if this court concludes that he forfeited "the ***Batson*** issue because his trial counsel did not initially raise it," then his trial counsel provided ineffective assistance for not raising the issue.[4] We affirm the judgment and orders.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable Jeffrey A. Conen presided over the trial and sentenced Winston. The Honorable David L. Borowski denied the first postconviction motion, which is the motion that addressed the issues raised on appeal. The Honorable Daniel A. Konkol denied the second postconviction motion that addressed issues not relevant to this appeal.

[3] Winston has not pursued other issues he raised in his postconviction motions, such as newly discovered evidence and prosecutorial misconduct. Those issues are deemed abandoned and we will not discuss them. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues not briefed are deemed abandoned.).

We also note that throughout this decision, we have substituted the correct spelling of the words peremptory and ***Batson*** whenever they were misspelled in the transcripts or briefs. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). In addition, we have deleted underlined words and added italics and bolding to signify case names, we have italicized Latin words, and we have altered capitalization in quotations from the postconviction motion and from the trial court and appellate briefs.

[4] In ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, the supreme court distinguished waiver from forfeiture, stating: "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *See* ***id.***, ¶29 (citation omitted). While Winston's brief references the possibility that he "waived" the jury selection issue, it is more accurate to say that he may have "forfeited" the issue, and that is the term we will use in this decision.

BACKGROUND

¶2 Winston, an African-American, went to trial on three felonies. During the jury selection process, after several potential jurors had been struck for cause, the State and Winston were each allowed to use seven peremptory strikes to eliminate a total of fourteen of the remaining twenty-eight potential jurors.[5] After each side struck seven jurors, the State told the trial court: "Judge, at this point I do want to preserve a motion based on ***Batson***, I think I have to preserve it as soon as it happens with the defense. We can deal with it after we're done here." The trial court responded: "All right. It's preserved." Winston's counsel did not offer any comment at that time.

¶3 Later, while those selected for the jury were at lunch and before they were sworn, the trial court said that it would consider the State's ***Batson*** issue. The State and the trial court had this exchange:

> [THE STATE]: Judge, I will just make my record and this is very unusual. I don't think I've ever brought this motion on behalf of the State before, but the record is going to reflect that there are no African-Americans on this jury panel. The—
>
> THE COURT: Just so the record is clear even though I believe there were at least four to five that were on the larger panel.
>
> [THE STATE]: Yes, there were. The defense chose—and they may have a reason—but they chose to strike three or four of the African-Americans on this jury panel, the State struck one; and I want the record to reflect for the appellate courts that it was the defense that struck three or four African-Americans in this case and that is the reason why there are no African-Americans on this jury panel.

[5] Fourteen jurors heard the trial. Two randomly selected alternates were excused before jury deliberations.

> Now, there may be a strategic reason for this, certainly the defense may have reasons for it, but I don't want this coming back saying that the State was the one that struck the African-Americans; it was the defense that did that.
>
> THE COURT: So let's put this all to bed. Let's have each of the parties give their race-neutral reasons for striking the people that they struck, let's just make our record of all of that so we don't have an issue with regard to that.

¶4 The State explained its reasons for striking Juror 27, which included the man's age, employment, jewelry, and the fact that he "was sighing" during the jury selection process. After the State offered its explanation, trial counsel said: "Well, maybe I should formally say out loud I am challenging their striking of Juror 27 and I believe their reasons are insufficient."

¶5 Trial counsel then offered his explanations for striking three jurors, such as the fact that one had been the victim of an armed robbery. The trial court concluded: "[I]t appears that all the strikes are race-neutral." The State replied: "I agree. I don't have an objection."[6] The trial court said that it had questioned the defense's decision to strike three African-American women, but it did not believe it needed to start over with jury selection "as long as the defendant himself agrees with [the defense's] strategy." Winston told the trial court that he agreed with his counsel's jury selection strategy. Trial counsel did not offer any additional argument in support of his earlier objection to the State's striking of Juror 27 and did not ask the trial court to take testimony or make factual findings

[6] We infer that by making this statement, the State was waiving any concerns it had with Winston's strikes and was choosing not to pursue a ***Batson*** claim.

with respect to the striking of the jurors. The trial court then moved on to other issues and the ***Batson*** issue was not raised again during the trial.

¶6 The jury found Winston guilty of the aforementioned crimes and acquitted him of a second count of first-degree intentional homicide. The trial court imposed a mandatory sentence of life imprisonment for the homicide, and it chose not to make Winston eligible for extended supervision. The trial court imposed a two-year concurrent sentence for possessing a firearm.

¶7 Winston filed a postconviction motion alleging, as relevant to this appeal, that "the State used racial discrimination when it used a peremptory challenge to strike an African-American juror." Winston also argued that if the trial court were to conclude that Winston forfeited "his right to raise the ***Batson*** issue," then the forfeiture was the result of trial counsel's constitutionally deficient representation. The trial court denied Winston's motion without a hearing. Winston subsequently filed another postconviction motion raising unrelated issues, which was also denied without a hearing. This appeal follows.

LEGAL STANDARDS

¶8 Notwithstanding the general rule that peremptory strikes may be made for any reason, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." ***Batson***, 476 U.S. at 89. ***Batson*** "outlined a three-step process for determining if a prosecutor's peremptory strikes violated the Equal Protection Clause." ***State v. Lamon***, 2003 WI 78, ¶27, 262 Wis. 2d 747, 664 N.W.2d 607 (citing ***Batson***, 476 U.S. at 96-98). ***Lamon*** explained the first step:

> First, in order to establish a *prima facie* case of discriminatory intent, a defendant must show that: (1) he

> or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire, and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race. The [trial] court must consider all relevant circumstances in determining whether a defendant made the requisite showing. Those circumstances include any pattern of strikes against jurors of the defendant's race and the prosecutor's voir dire questions and statements.

Id., ¶28 (citations and footnote omitted).

¶9 If the defendant has established a *prima facie* case, the trial court moves to the second step, where "'the burden shifts to the State to come forward with a neutral explanation for challenging [the dismissed venireperson].'" ***Id.***, ¶29 (quoting ***Batson***, 476 U.S. at 97; bracketing in ***Lamon***). "Unless discriminatory intent is inherent in the prosecutor's explanation, 'the reason offered will be deemed race neutral.'" ***Id.***, ¶30 (citation omitted).

¶10 In the third step, after "the prosecutor offers a race-neutral explanation, the [trial] court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established." ***Id.***, ¶32. ***Lamon*** continued:

> As part of this third step, a defendant may show that the reasons proffered by the State are pretexts for racial discrimination. The defendant then has the ultimate burden of persuading the [trial] court that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination. Therefore, it is at this step that the issue of persuasiveness and plausibility of the prosecutor's reasons for the strike become relevant.

Id., ¶32 (citations omitted).

¶11 On appeal, appellate courts apply the clearly erroneous standard of review to the trial court's application of all three steps. *See* ***id.***, ¶37.

DISCUSSION

¶12 Winston argues that "the trial court erred when it decided that there was no ***Batson*** violation at the jury trial and when it denied [the] postconviction motion on this issue." Winston asserts that the State struck "Juror 27 from the jury on account of his race," and he also complains that "the State improperly supplemented the record in its response to Winston's postconviction motion" by providing additional explanation for the State's decision to strike Juror 27. In addition, Winston argues that if he is held to have forfeited his ***Batson*** challenge, then his trial counsel was ineffective for not properly raising the issue.[7]

¶13 We conclude that Winston did not properly raise or preserve a ***Batson*** challenge during the trial. As noted, Winston did not raise the issue with the trial court. It was only after the State raised concerns about the removal of all African-Americans from the jury that the trial court asked the parties to state the reasons for their respective strikes. After the State gave its reasons, trial counsel offered a one-sentence objection to the State's explanation. Later, after the trial court declared "it appears that all the strikes are race-neutral," trial counsel did not disagree with that assessment, ask the trial court to make detailed factual findings about the reasons for the strikes, or ask the trial court to take testimony concerning Juror 27. In short, trial counsel did not ask the trial court to undertake the analysis

[7] Winston's postconviction motion and appellate briefs did not offer reasons why the court should not conclude he forfeited his ***Batson*** claim. Instead, Winston asserted that if he forfeited his claim, the trial court and this court should exercise discretion and consider the merits of his ***Batson*** claim.

in step three of the ***Batson*** test, during which the defense would have had the "ultimate burden of persuading the court that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination." *See* ***Lamon***, 262 Wis. 2d 747, ¶32. We conclude that Winston forfeited his ***Batson*** claim. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'[F]orfeiture is the failure to make the timely assertion of a right.'") (citation omitted).

¶14 Our conclusion that Winston forfeited his ***Batson*** claim does not end our analysis. Anticipating that a court might determine he forfeited his claim, Winston argued in his postconviction motion and again on appeal that any forfeiture was caused by trial counsel's constitutionally deficient performance. Thus, we will consider Winston's potential ***Batson*** claim in the ineffective-assistance-of-counsel context.

¶15 To prove ineffective assistance, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that 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.*** (citations and internal quotation marks omitted).

¶16 A postconviction motion alleging ineffective assistance of counsel may be denied without an evidentiary hearing "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted). "In reviewing a claim of ineffective assistance of counsel, 'we grant deference only to the [trial] court's findings of historical fact. We review *de novo* the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding.'" ***Id.***, ¶24 (citation omitted).

¶17 We conclude that Winston's postconviction motion did not demonstrate that he was prejudiced by his trial counsel's alleged deficiency. The first step in a ***Batson*** claim requires a defendant to show two things: (1) that he "is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire"; and (2) that "the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." *See* ***Lamon***, 262 Wis. 2d 747, ¶28. Winston's postconviction motion and his opening appellate brief alleged that a *prima facie* case was established because Winston is African-American and "the State used a peremptory strike to remove … a member of Winston's race from the jury." While those facts satisfy one of the two requirements for the first step in a ***Batson*** claim, Winston's postconviction motion and opening appellate brief did not specifically address the second requirement: particular facts or circumstances that raise an inference that the State used a peremptory strike to exclude Juror 27 because of his race. *See* ***Lamon***, 262 Wis. 2d 747, ¶28.

¶18 The State points out this deficiency in its appellate brief. Winston's reply brief attempts to refute the State's argument, arguing that "the lack of any questions of Juror 27 by the prosecutor is a *prima facie* showing of discriminatory intent." We decline to consider the merits of Winston's argument, as it was raised for the first time on appeal, such that the district attorney, the attorney general, and the trial court did not have an opportunity to analyze it. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited). Moreover, Winston has not identified relevant case law supporting his argument that a lack of questions by the State can signal discriminatory intent, and he has not adequately discussed what happened during the voir dire process before the point when the peremptory strikes were made. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider arguments that are "unsupported by references to legal authority" or "inadequately briefed").

¶19 For the foregoing reasons, we conclude that Winston's postconviction motion did not establish a *prima facie* case of discriminatory intent, the first step in the ***Batson*** analysis. *See* ***Lamon***, 262 Wis. 2d 747, ¶28. Thus, Winston's postconviction motion did not demonstrate that he was prejudiced by trial counsel's failure to preserve and pursue a ***Batson*** claim. Accordingly, Winston was not entitled to a hearing or relief based on his postconviction motion's allegation that he received constitutionally deficient representation. *See* ***Roberson***, 292 Wis. 2d 280, ¶43.

By the Court.—Judgment and orders affirmed.

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