COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP211-CR

Cir. Ct. Nos. 2013CF662
2013CF1297
2013CF1477
2013CF1478
2013CF1799

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD DANIEL BENSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Richard Benson appeals his convictions on six felony charges entered on a jury verdict, as well as a circuit court order denying his postconviction motions. Benson claims his trial counsel rendered constitutionally ineffective assistance and contends the circuit court erred when it denied his ***Batson***[1] challenge to the State's peremptory strike of one juror. We reject Benson's arguments and affirm.

BACKGROUND

¶2 The State charged Benson in five separate Milwaukee County cases with the following offenses: (1) second-degree sexual assault of a child under age sixteen; (2) attempted first-degree sexual assault of a child under age thirteen; (3) first-degree sexual assault of a child under age sixteen by use of force; (4) second-degree sexual assault of a child under age sixteen; (5) incest; and (6) felony intimidation of a witness. The parties reached a plea agreement in which Benson agreed to plead guilty to second-degree sexual assault of a child under age sixteen and attempted first-degree sexual assault of a child under age thirteen, and the State agreed to recommend dismissal with prejudice of the remaining charges. The circuit court accepted Benson's two guilty pleas and dismissed the remaining charges with prejudice.

¶3 Benson later filed motions to withdraw his guilty pleas. After the circuit court granted Benson's motions, the State pursued all of the charges from the original five cases against Benson without objection.

[1] Referring to ***Batson v. Kentucky***, 476 U.S. 79 (1986).

¶4 The case proceeded to trial. During voir dire, the prosecutor exercised a peremptory strike and removed Juror 5, an African-American woman, from the venire panel.[2] Benson, who is also African American, made a ***Batson*** objection, claiming the prosecutor violated the Equal Protection Clause by striking Juror 5. The prosecutor gave three explanations for her strike: (1) during the initial voir dire when jurors were asked to respond to questions on a preprinted form, Juror 5 said she lived on the "north side" of Milwaukee, and some of the crimes that were the subject of the trial occurred on the north side; (2) during that initial voir dire, Juror 5 said that she had two boys who were "roughly similar in age to the defendant"; and (3) Juror 5 did not respond to any of the questions subsequently asked of the panel during voir dire. The circuit court determined that the strike was not purposefully discriminatory.

¶5 The jury convicted Benson of all charges. The circuit court sentenced Benson to a total of fifty years' initial confinement and twenty-five years' extended supervision. Benson then sought to vacate the judgments, alleging ineffective assistance of his trial counsel for failing to challenge on double jeopardy grounds the reinstatement of the four charges previously dismissed with prejudice. He also contended that, if successful on his ineffective assistance double jeopardy claim, the retroactive misjoinder doctrine required the court to vacate his convictions on the other two charges, which had never been

[2] The parties dispute whether Juror 5 was the sole African-American juror on the panel. Benson argues Juror 5 was the only *identified* African-American juror on the panel. The circuit court and the prosecutor indicated uncertainty as to the race of two other jurors, stating that they may have been of "mixed race."

dismissed.[3] The court denied Benson's motions. Benson now appeals the court's denial of his ***Batson*** challenge and its order denying his postconviction motions.

DISCUSSION

I. Ineffective assistance of counsel

¶6 Benson's ineffective assistance of counsel claim requires us to determine whether the State violated his constitutional right to be free from double jeopardy. Whether an individual has been twice placed in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution and art. I, § 8 of the Wisconsin Constitution is a question of law. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). Therefore, we owe no deference to the circuit court's decision. ***Id.***

¶7 Both the United States and Wisconsin Constitutions protect a criminal defendant against being twice placed in jeopardy for the same offense. ***Id.*** The double jeopardy clause embodies three protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense. ***Id.*** Here, Benson argues that the dismissals with prejudice of four of the charges against him constituted acquittals.

[3] Benson argued that the doctrine of retroactive misjoinder applies to the charges for which he pleaded guilty. Under the doctrine of retroactive misjoinder, a defendant who was tried for multiple counts in a single trial is entitled to a new trial on the remaining counts when an appeals court vacates his or her conviction on one or more counts, if the defendant shows compelling prejudice arising from evidence introduced to support the vacated counts. ***State v. McGuire***, 204 Wis. 2d 372, 380-81, 556 N.W.2d 111 (Ct. App. 1996). Benson claimed the charges were improperly joined because the charges previously dismissed with prejudice were wrongfully reinstated, and, accordingly, he suffered prejudice. This argument entirely depends on whether the reinstatement of the previously dismissed charges constituted double jeopardy.

¶8 Benson failed to challenge the reinstatement of the previously dismissed charges when he withdrew his pleas. Therefore, he now raises the issue in the context of an ineffective assistance of counsel claim. While arguments not raised at the circuit court are generally deemed forfeited, ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702, criminal defendants may claim ineffective assistance of counsel for counsel's failure to make such arguments, *see* ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 583.

¶9 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's conduct constituted deficient performance; and (2) the defendant was prejudiced as a result of counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must demonstrate that counsel's actions or inactions "were outside the wide range of professionally competent assistance." ***Id.*** at 690. Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689. To establish prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶10 The Supreme Court has long recognized that the double jeopardy clause bars retrial following a court-decreed acquittal. *See* ***Evans v. Michigan***, 568 U.S. 313, 318 (2013). An acquittal has been defined to "encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." ***Id.*** (citations omitted). However, the dismissal of charges as part of

the plea negotiations in this case did not constitute an acquittal for purposes of double jeopardy because the circuit court made no such ruling here.

¶11 Benson contends the dismissals with prejudice constitute acquittals because the State explained to the circuit court it was moving for dismissal with prejudice—rather than to have the charges dismissed and read in—as Benson was "not making an admission that would be required for any type of read-in for those other cases …." Benson claims the circuit court's acceptance of the plea deal constituted a "substantive ruling" by the court that the State lacked sufficient evidence to establish criminal liability. We reject Benson's argument. By accepting the plea and dismissing the counts with prejudice, the court merely acknowledged Benson did not admit to the charges. The court simply never determined that the prosecutor had insufficient proof to convict Benson of the dismissed charges.

¶12 Benson's focus on the dismissals being "with prejudice" is also misplaced. "'Dismissal without prejudice,' by definition, permits 'the complainant to sue again on the same cause of action.'" ***Jason B. v. State***, 176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993) (quoting BLACK'S LAW DICTIONARY 469 (6th ed. 1990)). On the other hand, a dismissal with prejudice generally bars any subsequent action. "Dismissed with prejudice" refers to a case "removed from the court's docket in such a way that the plaintiff is foreclosed from filing a suit again on the same claim or claims." *Dismissed with prejudice*, BLACK'S LAW DICTIONARY (10th ed. 2014). However, this distinction is irrelevant in this case because Benson repudiated the plea agreement that brought about the dismissals.

¶13 Here, Benson successfully moved to withdraw his guilty pleas. Our supreme court has held that "[i]nvalidating the plea invalidates the plea bargain," and it returned the case to the circuit court "in the same posture it occupied prior to the [plea] hearing." ***State v. Pohlhammer***, 78 Wis. 2d 516, 524, 254 N.W.2d 478 (1977). "On numerous occasions, courts have held that the defendant may be prosecuted on counts dismissed as part of a vitiated plea bargain." ***Fransaw v. Lynaugh***, 810 F.2d 518, 524 (5th Cir. 1987). Benson's own motion to withdraw his plea framed his "goal" as "to withdraw his guilty plea[s] and return to the procedural position he was in prior to entering those pleas."

¶14 Because the dismissals with prejudice were not acquittals, double jeopardy principles did not bar reinstatement of the dismissed charges, and, as a result, Benson's retroactive misjoinder argument also fails. Benson's attorney was not deficient for failing to bring a motion challenging reinstatement of the dismissed charges because such a motion would have been properly denied. *See* ***Maloney***, 281 Wis. 2d 595, ¶37.

¶15 Benson also claims the prosecutor should have included some type of a double jeopardy "waiver" or similar provision in the plea agreement. However, Benson fails to provide any authority supporting the contention that a prosecutor must warn a defendant at the time he or she enters a plea of the consequences should the defendant later withdraw his or her plea. We need not address arguments that are undeveloped or unsupported by citation to legal authority. ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990).

II. ***Batson*** *challenge*

¶16 Benson next contends the circuit court erred by denying his ***Batson*** challenge. After voir dire concluded and counsel exercised their strikes, the jury was removed from the courtroom so counsel could make a record of an "informal conference" regarding the parties' strikes for cause and the State's peremptory strike of Juror 5. As to the peremptory strike, Benson's trial counsel argued that Juror 5 "appear[ed] to be the only African-American on the jury panel and she was remarkably quiet throughout." He concluded that, "[b]ecause she is African-American and Mr. Benson is African-American, I believe that that strike violates his right to due process."

¶17 The Equal Protection Clause of the U.S. Constitution forbids prosecutors from striking potential jurors solely on account of their race. ***Batson***, 476 U.S. at 89. Wisconsin has adopted the three-step ***Batson*** analysis for determining if a prosecutor's peremptory strikes violated the Equal Protection Clause. ***State v. Lamon***, 2003 WI 78, ¶¶22, 27, 262 Wis. 2d 747, 664 N.W.2d 607.

> 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, 358-59 (1991) (citing ***Batson***, 476 U.S. at 96-98). "Wisconsin law is in accord with the U.S. Supreme Court, holding that discriminatory intent is a question of historical fact, and the clearly erroneous

standard of review applies at each step of the ***Batson*** analysis." ***Lamon***, 262 Wis. 2d 747, ¶45.

¶18 To establish a prima facie case of discriminatory intent, the 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.

Lamon, 262 Wis. 2d 747, ¶28 (footnote omitted). Here, there is no dispute that Benson is African-American, and that Juror 5 is African-American. Nonetheless, the circuit court determined that Benson's challenge did not rise to the level of a prima facie showing of discriminatory intent, at least in part because the prosecutor identified two other remaining members of the panel that she believed "could be of mixed race."

¶19 Regardless, the prosecutor also offered three race-neutral reasons for striking Juror 5:[4] (1) during voir dire, Juror 5 said she lived on the "north side" of Milwaukee, and some of the crimes at issue occurred on the north side of Milwaukee; (2) Juror 5 said that she has two boys who were "roughly similar in age to the defendant"; and (3) Juror 5 did not respond to any of the questions asked during voir dire beyond the introductory questions asked by the circuit

[4] As the initial discussion of Benson's motion was off the record, it is unclear whether the prosecutor voluntarily provided reasons for striking Juror 5 prior to the circuit court's determination on step one of ***Batson***. Both attorneys' descriptions of the arguments suggest that there had not been a determination on step one of the three-part ***Batson*** analysis when the prosecutor offered her reasons during the informal discussion.

court.[5] The court then completed steps two and three of the analysis under ***Batson***. "When the prosecutor offers a race-neutral explanation for peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie showing becomes moot." ***State v. King***, 215 Wis. 2d 295, 303, 572 N.W.2d 530 (Ct. App. 1997) (citing ***Hernandez***, 500 U.S. at 359). Therefore, we review the court's determinations as to the race-neutrality of the prosecutor's explanations and the absence of any discriminatory intent for an erroneous exercise of discretion.

¶20 In step two of the ***Batson*** analysis, a neutral explanation means an explanation based on something other than race. ***Lamon***, 262 Wis. 2d 747, ¶30. Facial validity of the explanation is the issue. ***Id.*** Unless discriminatory intent is inherent in the prosecutor's explanation, the court will deem the reason to strike the juror as being race-neutral. ***Id.***

¶21 The circuit court accepted the prosecutor's stated reasons, commenting that it thought "the State ha[d] made a clear and reasonably specific explanation." Benson challenges the court's determination as to the prosecutor's first reason, arguing that striking Juror 5 due to her residence on the "north side" of Milwaukee was not a race-neutral explanation.[6] He alleges that "north side" means the area of Milwaukee "where African-Americans are the vast majority of the residents."

[5] The record reflects that prior to the prosecutor or defense counsel posing questions to the jury panel, the circuit court asked the potential jurors questions, which were listed on a sheet.

[6] Benson concedes that the prosecutor's second reason was race-neutral. He also argues that the third reason was facially not race-neutral without explaining why.

¶22 Benson raises the argument that the prosecutor's first reason was not race-neutral for the first time on appeal. His trial counsel's objection was only that the north side of Milwaukee is a very large place and Juror 5's residence there does not demonstrate much of a connection to Benson's case. As such, this new argument is not properly before this court, and it has no bearing on whether the circuit court's decision was clearly erroneous. Moreover, even if Benson had preserved this argument for appeal, "[c]ourts have routinely held that striking a juror because he or she lived in close proximity to some witness or evidence in the case to be tried is a race-neutral reason." ***United States v. Williams***, 936 F.2d 1243, 1247 (11th Cir. 1991)); ***State v. Gregory***, 2001 WI App 107, ¶13, 244 Wis. 2d 65, 630 N.W.2d 711 (citing ***United States v. Briscoe***, 896 F.2d 1476, 1488-89 (7th Cir. 1990). Therefore, Benson has not demonstrated that the court improperly exercised its discretion as to step two of ***Batson***.

¶23 In the third step of a ***Batson*** analysis, after the prosecutor offers a race-neutral explanation, the circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established. ***Lamon***, 262 Wis. 2d 747, ¶32. Here, the circuit court stated:

> Considering the totality of the circumstances, I think the State has made a clear and reasonably specific explanation. It was not discriminatory. And although [Juror 5] didn't answer anything other than when she stood and read the card and answered the questions that were on the card, that is I think significant that she didn't comment ... she really was very unresponsive during all of the questioning. The broad spectrum of questioning that everyone asked, both sides, in court in a more general sense would have prompted some response to something. The fact that she didn't respond to anything I think is a concern.
>
> The other explanation that she lives in the general area of some of the alleged crimes and has sons of a similar age to the defendant are concerns. And the fact of the matter is the State expressed a concern about [another juror], asked

> that she be struck for cause because her son was convicted, and to have sons the same age or similar to a defendant is a factor that's legitimate to consider.
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> ….
>
> [I]t goes to did the State believe the State was striking the only African-American, and if she reasonably believed that the other two males may have been of a mixed race and possibly African-American, they got left on. Another indication of no intent.

¶24 In considering the appropriate standard of review for the circuit court's determination as to discriminatory intent, our supreme court explained:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in ***Batson***, the finding "largely will turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Lamon, 262 Wis. 2d 747, ¶43 (quoting ***Hernandez***, 500 U.S. at 365).[7]

¶25 Because we apply a clearly erroneous standard to our review of the circuit court's determination of whether Benson has carried his burden of proving purposeful discrimination, and discriminatory intent is a question of historical fact,

[7] While there is no decision specifically holding that ***Batson*** arguments not made in the circuit court must be considered on appeal, courts have repeatedly done so. *See, e.g.*, ***Foster v. Chatman***, 136 S. Ct. 1737, 1755 (2016) (relying on newly discovered evidence thirty years after the trial to find the prosecutor made "a concerted effort to keep black prospective jurors off the jury"); ***State v. Gregory***, 2001 WI App 107, ¶14, 244 Wis. 2d 65, 630 N.W.2d 711 (considering evidence as to the veracity of the prosecutor's reasons for striking a juror first introduced at a postconviction hearing).

id., ¶45, Benson's full critique of the prosecutor's explanations as made in this appeal should have occurred before the circuit court. "[A] circuit court's decision on a ***Batson*** challenge must be made before the jury is sworn." ***Gregory***, 244 Wis. 2d 65, ¶14. Trial counsel may request an adjournment at the time the challenge is made if more evidence or argument is needed to complete the ***Batson*** hearing. ***Gregory***, 244 Wis. 2d 65, ¶14. That did not occur in this case. Nonetheless, despite not having the benefit of Benson's additional arguments made now on appeal, the circuit court was in the best position to evaluate the credibility of the prosecutor.

¶26 Benson's appellate argument as to step three of ***Batson*** also focuses primarily on Juror 5's residence on the "north side" of Milwaukee. In an attempt to show that the circuit court's finding of no discriminatory intent was clearly erroneous, Benson analyzes the locations of the crimes in relation to the residences of the potential jurors and indicates that two out of four assaults occurred on the "north side," one occurred on the "east side," and one occurred in the south side neighborhood of Bay View.[8] Benson also makes a lengthy and convoluted comparison of where Juror 5 might have lived in relation to the locations of the charged crimes, and the distances between some of the other prospective jurors' residences (based on their zip codes) and the charged crimes. Throughout this analysis, Benson makes up facts, draws unsupportable inferences,[9] and repeatedly

[8] Benson does not include any argument as to the fifth location.

[9] Benson highlights Juror 28 in his discussion of the Bay View crime because Juror 28 reported she lived in Bay View. He argues: "The prosecutor did not assert that had the selection process extended as far into the panel as juror 28 she would have struck juror 28 because juror 28 lived 'where some of these crimes occurred ….'" This implies that Juror 28 was not empaneled

(continued)

cites to evidence outside the record. There are multiple citations to "Google searches," "Google maps," "CCAP," "Milwaukee Portal" and "zipmap.net."

¶27 These facts are not properly before this court, and we decline to take judicial notice of the multitude of "evidence" Benson attempts to introduce, especially given his prior misstatements of fact from the record. *See* ***Perkins v. State***, 61 Wis. 2d 341, 346-47, 212 N.W.2d 141 (1973) (stating that a court "cannot take judicial notice of records that are not immediately accessible to it or are not under its immediate control" and noting that the "tendency is to extend judicial notice beyond the field of facts of common knowledge to the sphere of those facts capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (internal citation omitted)). Moreover, while Benson identifies some potential jurors who lived near the location of one of the crimes, the prosecutor struck Juror 5 because she lived in the neighborhood in which Benson committed multiple crimes.

¶28 Benson also contends the prosecutor's "north side" explanation was a pretext for discrimination. The defendant may, as part of the third step of a ***Batson*** challenge, show that the reasons the State proffered are pretexts for racial discrimination. ***Gregory***, 244 Wis. 2d 65, ¶8. When attempting to prove the prosecutor's reasons were pretextual, the focus must be on what the prosecutor knew about the potential juror when he or she made the strike. ***Id.***, ¶14. "Therefore, ... a defendant must show either that the prosecutor intentionally

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because she was sufficiently far down the list and thirteen other potential jurors who were higher up on the list were selected. However, the record reflects that this implication is incorrect, as Juror 28 was struck for cause. Thus, any comparison between the prosecutor's treatment of Juror 5 and Juror 28 is irrelevant because Juror 28 would have been struck prior to the prosecutor's exercise of peremptory strikes.

misrepresented the facts he said he relied on or that he had been told those facts but he knew they were erroneous." ***Id.*** Benson failed to make any such argument during the third step of the circuit court's ***Batson*** analysis. Nor does Benson now argue that the prosecutor intentionally misrepresented facts or relied on facts she knew to be erroneous. Thus, he fails to support his contention that the reasons the prosecutor gave were pretexts for racial discrimination. We do not address unsupported arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244, 430 N.W.2d 366 (Ct. App. 1988).

¶29 Benson also identifies two other jurors who had children close in age to the defendant and various jurors who were "just as 'unresponsive' as [J]uror 5." He then specifically compares Juror 25's circumstances to Juror 5's, alleging that this comparison reveals the prosecutor's discriminatory intent. Benson posits that Juror 25 "lived about the same distance from Bay View as did juror 5," had four children ranging in age from 46 to 38, and "did not answer any questions from the state or the defense." While there are some similarities, Benson simply does not identify any other potential juror who also lived in the neighborhood in which the majority of the crimes occurred, had sons close in age to Benson, and was "remarkably quiet" during voir dire. At most, the other potential jurors Benson now identifies for comparison could have met two out of the three reasons the State gave for striking Juror 5.

¶30 Benson's new arguments and proffered evidence do not demonstrate that the circuit court's determination regarding the lack of a discriminatory motive for the State's preemptory strike of Juror 5 was clearly erroneous. Because the circuit court's determination that Benson failed to prove the prosecutor's use of a peremptory strike was an act of purposeful racial discrimination is not clearly erroneous, we affirm.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).