COURT OF APPEALS
DECISION
DATED AND RELEASED

May 28, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0493-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RALPH MONROE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Ralph Monroe, Jr. appeals from a judgment of conviction of party to the crime of attempted first-degree murder and from an order denying his postconviction motion. He argues that his right to a fair and impartial jury was violated by the prosecution's peremptory strike of the only African-American venireperson, that custodial statements should have been

suppressed because he had invoked his right to counsel, and that the restriction on his cross-examination of prosecution witnesses violated his right to confront witnesses. We reject Monroe's claims and affirm the judgment and the order.

Monroe was charged with planning and directing fellow gang member Jonathon Britt to shoot Anthony Bean. The shooting occurred in the early evening on September 15, 1993, at a community center. Monroe was arrested outside of his residence that same evening. He was advised of his ***Miranda*** rights and subsequently made statements to the police.

At the time of his arrest, Monroe was being represented by an attorney on a traffic matter. Monroe testified that when he refused to sign the waiver of rights form, he told police that he wanted his lawyer. He also indicated that he told police that he "wasn't talking unless my attorney was here." He argues that police failed to cease the interrogation in light of the invocation of his right to counsel.

In ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), the Supreme Court established a bright-line rule requiring a law enforcement officer to immediately stop questioning once a suspect has invoked his or her right to counsel. However, the request for counsel must be sufficiently clear so that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." ***Davis v. United States***, 512 U.S. ___, 114 S. Ct. 2350, 2355 (1994). A request for counsel "is equivocal when, in light of the circumstances, a reasonable police officer understands only that the suspect might be invoking the right to have counsel present." ***State v. Long***, 190 Wis.2d 386, 397, 526 N.W.2d 826, 830 (Ct. App. 1994). The validity of a

confession made after a request for counsel involves questions of constitutional fact which are subject to independent appellate review and require an independent application of constitutional principles involved to the facts as found by the trial court. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832-33 (1987).

The trial court found that Monroe had not asked for an attorney and that he voluntarily answered the officers' questions. This finding is not clearly erroneous. *See* § 805.17(2), STATS. The two officers who conducted the interview testified that Monroe did not mention that he had an attorney and did not ask for an attorney. The trial court found the officers to be more credible than Monroe. Even assuming that Monroe told the officers that he had an attorney or mentioned the attorney by name, it was an equivocal request and did not require the cessation of questioning or clarification of whether counsel was being requested. *See* ***State v. Jones***, 192 Wis.2d 78, 95-96, 110-11 (Abrahamson, J., dissenting), 532 N.W.2d 79, 85-86, 92 (1995). We conclude that Monroe's statements were not subject to suppression.

Monroe argues that his right to a fair and impartial jury was violated when the prosecutor used a peremptory strike to remove the only venireperson of Monroe's race, African-American. A three-step process is used to evaluate a claim that a party has used peremptory strikes in an unconstitutional manner:

> First, the objecting party must make a prima facie showing of purposeful discrimination by showing that the opposing party has exercised peremptory challenges on the basis of race or gender. Second, once the required showing is made, the burden shifts to the opposing party to articulate a race- or gender-neutral explanation for striking the jurors in question. Third, the trial court must determine whether the objecting party has carried the burden of proving purposeful discrimination.

State v. Joe C., 186 Wis.2d 580, 585-86, 522 N.W.2d 222, 224 (Ct. App. 1994) (citations omitted). The trial court's ruling on each of the steps is reviewed under the clearly erroneous standard. *See* ***State v. Lopez***, 173 Wis.2d 724, 729, 496 N.W.2d 617, 619 (Ct. App. 1992).

Assuming that Monroe established a prima facie case,[1] we turn to the prosecution's explanation for striking the African-American venireperson. The prosecution explained that the venireperson was struck because her sister had been prosecuted in a juvenile proceeding by Monroe's trial counsel when that attorney worked as a prosecutor and because she admitted knowledge of Britt, the shooter, by visiting a family member in jail. The prosecution indicated concern that the venireperson would be biased against the prosecution as a result of the action against her sister and that she was visiting the jail when many of its witnesses were in jail. The trial court found that this was a race-neutral reason for striking the venireperson. We agree. The prosecution articulated two legitimate reasons why it did not want that venireperson on the jury. *See* ***State v. Davidson***, 166 Wis.2d 35, 41, 479 N.W.2d 181, 183 (Ct. App. 1991) (kinship to person who has been criminally charged or convicted may constitute a legitimate racially-neutral reason for striking a venireperson). The striking of that person was not a constitutional deprivation.

[1] Monroe argues that ***State v. Walker***, 154 Wis.2d 158, 177, 453 N.W.2d 127, 135 (1990), and ***State v. Davidson***, 166 Wis.2d 35, 40, 479 N.W.2d 181, 183 (Ct. App. 1991), hold that a prima facie case is made upon showing that the defendant is African-American, that only one of the venirepersons was African-American, that the prosecution used a peremptory challenge to strike this venireperson, and that the defendant would not have struck that person. The State argues that mere proof that the prosecution exercised a peremptory strike against a member of a particular racial group does not make a prima facie showing. *See* ***State v. Joe C.***, 186 Wis.2d 580, 587-88, 522 N.W.2d 222, 225 (Ct. App. 1994). We need not decide which position is correct.

At trial, Monroe wanted to cross-examine the victim, Bean, and another prosecution witness, Carlos Butler, about charges pending against them, the reduction of those charges, and their probationary status.[2] The trial court denied Monroe's motion to explore such matters. Monroe argues that the limitation on cross-examination denied him his constitutional right to confront witnesses.

The scope of cross-examination for impeachment purposes is within the sound discretion of the trial court. *See* ***State v. McCall***, 202 Wis.2d 29, 35, 549 N.W.2d 418, 420 (1996). We must defer to the trial court's determination if a reasonable basis exists for it. *See* ***id.*** at 36, 549 N.W.2d at 421. It is the duty of the trial court to "curtail any undue prejudice by limiting cross-examination, including the exclusion of bias evidence which would divert the trial to extraneous matters or confuse the jury by placing undue emphasis on collateral issues." ***Id.*** at 41-42, 549 N.W.2d at 423. Even the constitutional right to confront witnesses is not absolute and does not restrict the trial court's latitude to impose reasonable limits on cross-examination based on concerns about prejudice, confusion or relevancy. *See* ***id.*** at 43-44, 549 N.W.2d at 424.

The trial court noted that there was no objective proof that any deal had been made by the prosecution with Bean or Butler. It found that to explore the vagaries of how each charge against the two witnesses arose and was disposed of

[2] At the pretrial hearing, Monroe represented that at the time of the shooting Bean was subject to charges of aggravated battery while armed, first-degree reckless endangering, possession of a short-barreled shotgun and cocaine possession. After the shooting, Bean pled to a simple misdemeanor cocaine possession. Bean was arrested in January 1994 as a felon in possession of a firearm as a habitual offender. The habitual offender charge was eventually dismissed and Bean was sentenced concurrently to the D.I.S. program. Bean was to be on probation by the time of trial. Monroe explained that Butler had pending charges of battery and possession of cocaine while armed and a pending probation revocation. The prosecution took no exception to Monroe's explanation of the charges against these two witnesses.

would be collateral and invite the jury to speculate on reasons for prosecutorial decisions regarding the two witnesses. The trial court acknowledged that the witnesses could be questioned about whether other charges were pending and whether they received any benefit by their testimony. Indeed, there was extensive cross-examination of Bean about the fact that he first revealed that Monroe had ordered the shooting when he was arrested on new charges. There was also cross-examination of Butler about pending charges and a written plea for leniency he made after testifying in Britt's trial.[3] As to both witnesses, in addition to their gang membership and prior convictions, there was ample impeachment evidence. We conclude that the trial court properly exercised its discretion in limiting the cross-examination of Bean and Butler.

The final issue also involves a limitation on cross-examination and is governed by the standard of review previously recited. At trial, witness Paul Womack testified that he had seen Monroe handing out guns before the shooting and that afterwards Monroe had told Britt that Bean should have been shot in the head. Womack admitted that he purchased cocaine from Monroe. He further testified that he had received treatment for his drug addiction by completing the twelve step Narcotics Anonymous program. On cross-examination, Monroe asked Womack to repeat the twelve steps. The prosecution's objection to the question was sustained. Monroe admitted that he had released his treatment records to the prosecution but that he refused to give them to the defense. Monroe was

[3] We agree with the State that the cross-examination covered virtually every aspect the defense could have hoped to bring out. Monroe did not make any offer of proof as to what additional information he was foreclosed from using. We have not considered the documents included in Monroe's appendix, which are not part of the record. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis.2d 119, 125-26, 353 N.W.2d 63, 66 (Ct. App. 1984) (an appellate court may review only matters of record in the trial court and cannot consider materials outside that record).

precluded from exploring Womack's refusal to release his treatment records to the defense.

Monroe argues that because the trial court prevented these two lines of inquiry, he was denied the ability to attack Womack's credibility and demonstrate Womack's bias. The trial court ruled that the questions about Womack's refusal to release treatment records to the defense were irrelevant and pertained only to a collateral matter. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). Whether Womack refused to release his treatment records to the defense is not material to the case. While Womack's promise to do so[4] and later refusal might impeach his credibility, exploring the reason for his change of heart is collateral. Likewise, as the trial court ruled, Womack's ability to recite the twelve steps of his rehabilitation program was irrelevant and collateral. The trial court properly exercised its discretion in limiting the cross-examination of Womack on these topics.

Moreover, there was ample examination that tended to impeach Womack, thereby rendering inquiry into the collateral topics cumulative. Womack admitted his addiction to crack cocaine at the time of his observation of Monroe and when he gave certain statements to police. He indicated that he stole from his wife and children to support his habit. Womack's treatment history was revealed, as well as his relapses and a suicide attempt. There was also evidence of Womack's potential bias. He acknowledged that the police believed he was connected with many crimes

[4] Included in this line of questioning of Womack was an admission that at a meeting at the district attorney's office on May 10, 1993, Womack stated that he would sign a release for the prosecution to divulge all treatment records.

when he spoke about Monroe's involvement in Bean's shooting. It was also brought out that Womack blamed his addiction and relapses on Monroe. Womack suggested that Monroe had caused Womack to lose his car. Given the other evidence demonstrating Womack's potential bias and impeaching his credibility, we cannot conclude that Monroe's constitutional right to confrontation was violated by the limitation on cross-examination.

By the Court.—Judgment and order affirmed.

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