**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 14, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP467-CR** **Cir. Ct. No. 2010CF4153**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EDDIE LEE ANTHONY,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 KESSLER, J. Eddie Lee Anthony appeals a judgment of conviction, following a jury trial, of first-degree intentional homicide. Anthony

also appeals from the order denying his postconviction motion for relief. We affirm.

## BACKGROUND

¶2 At issue in this appeal is whether the trial court erroneously denied Anthony his constitutional right to testify, and whether the trial court erroneously allowed the State to exercise a peremptory strike in violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986). On August 23, 2010, Anthony was charged with first-degree intentional homicide for the stabbing death of his live-in girlfriend, S.J. According to the complaint, Anthony lived with S.J., the children they shared, and S.J.'s 17-year old daughter, L.J. The complaint alleged that on the night of August 20, 2010, Anthony and S.J. argued at their home, prompting S.J. to leave the home. Anthony followed S.J. to their porch and then back into their house, arguing all the while. Two of the children told officers that Anthony held an ice pick while arguing with S.J. and that Anthony repeatedly threatened to kill S.J. During the argument, three of the children hid in a closet in S.J.'s bedroom, while L.J. left the house. After Anthony eventually left the home, the three children exited the closet and L.J. returned home to find her mother's body. The complaint alleges that S.J. died from multiple stab wounds. A bloody ice pick was recovered from S.J.'s bedroom. Anthony was arrested, charged, and eventually went to trial.

### A. The State's Peremptory Strike.

¶3 Anthony, who is African-American, did not deny stabbing S.J., but rather intended to go to trial and argue self-defense. During *voir dire*, but outside the presence of the jury, defense counsel objected to the general makeup of the jury panel, arguing a lack of African-American panel members. The jury panel consisted of 34 members, four of whom were African-American. Three of the

panel members were African-American women, and one was an African-American man. The trial court overruled the objection, stating that jurors are selected at random and there was no evidence that the clerk's office failed to adequately summon a diversity of jurors.

¶4 Defense counsel again objected during *voir dire* after the State exercised a peremptory strike to remove Juror Number 34, the only African-American male juror on the panel. The trial court, the State and defense counsel met at the sidebar. In its summary of the sidebar discussion, the trial court explained that defense counsel objected to the strike under ***Batson***, claiming that the State struck Juror Number 34 based on the juror's race. The State argued that it did not strike Juror Number 34 based on his race, but rather because Juror Number 34 was a youth minister and "might rely on some element of spirituality to decide the case [and] might actually be sympathetic to Mr. Anthony in a way [the State] was unsatisfied with." The trial court overruled defense counsel's objection, finding that the State put forth legitimate reasons for striking Juror Number 34.

**B. Anthony's colloquy with the trial court about his intent to testify.**

¶5 After the State rested, defense counsel informed the trial court of Anthony's intent to testify. After the trial court advised Anthony to answer "two" if asked how many prior convictions he had, in accordance with a pretrial ruling, Anthony indicated that he planned to tell the jury about a wrongful armed robbery conviction in 1966. The trial court told Anthony that the 1966 conviction was irrelevant to his case; however, Anthony insisted that he had a right to inform the jury that he was previously wrongfully convicted. The trial court again explained

the irrelevance of the information Anthony wanted to share with the jury, and Anthony again insisted that he would "bring everything out."

¶6 The trial court continued to explain to Anthony, multiple times, that he could not discuss irrelevant issues in front of the jury, specifically, the 1966 conviction. Anthony responded to each explanation by insisting that he had a "right" to discuss the conviction. Anthony also responded to the trial court's warnings by discussing other topics irrelevant to his case, such as the Egyptian god of cemeteries, an ancient Egyptian proverb, and his mother's death when he was a child. The trial court explained the multiple ways in which Anthony would hurt his defense by defying the trial court's order not to testify about the 1966 conviction, however Anthony did not relent. After additional warnings, the trial court ultimately concluded that Anthony "forfeited his right to testify," telling Anthony:

> [The Court]: So you understand what you've now decided is because you want to break my rule I'm not going to let you do that, you're giving up your chance to tell your side of the story to the jury. Do you understand that?
>
> [Anthony]: I understand; yes sir.

¶7 Ultimately, after hearing testimony from multiple witnesses, the jury convicted Anthony of first-degree intentional homicide.

**C. Anthony's Postconviction Motion.**

¶8 Anthony filed a postconviction motion for relief, arguing that he received ineffective assistance of counsel. Anthony argued that his defense counsel "performed deficiently by failing to (1) argue and present case law that Anthony's right to testify was absolute subject only to telling the truth and (2)

effectively and completely argue a valid ***Batson*** challenge." (Bolding and italics added.)

¶9 The trial court denied the motion in a written decision. The trial court stated that it would have overruled any objections made by defense counsel regarding Anthony's right to testify because it would not have permitted Anthony to testify about excluded or irrelevant material, nor did it wish to disturb the order of the court. The trial court noted Anthony's demeanor during his colloquy with the court was agitated, temperamental and defiant to the extent that additional deputies were called into the courtroom. The trial court wrote that it did not wish to subject the jury to such a potential disturbance.

¶10 The trial court also rejected Anthony's argument as to his ***Batson*** claim, stating that "even if Mr. Anthony's trial lawyer had offered the court [additional] authority … he would not have prevailed." The trial court reiterated its rationale used at trial, stating "[t]his case falls well to one side of the distinction between a prospective juror's religion and the prospective juror's religious activities."

¶11 This appeal follows. Additional facts from Anthony's trial are included as relevant to the discussion.

## DISCUSSION

¶12 On appeal, Anthony contends that the trial court erred when it: (1) denied Anthony the opportunity to testify in his own defense, and (2) ruled that Juror Number 34 was properly struck. Anthony alternatively argues that his defense counsel was ineffective for failing to raise the same issues.

## I. Anthony's Right to Testify.

¶13 A defendant's right to testify on his own behalf in defense of a criminal charge is a fundamental constitutional right. ***Rock v. Arkansas***, 483 U.S. 44, 53 n.10 (1987). A trial court's findings of historical fact relevant to whether a violation of a constitutional right has occurred will not be overturned unless they are clearly erroneous. ***State v. Landrum***, 191 Wis. 2d 107, 113-14, 528 N.W.2d 36 (Ct. App. 1995). Application of constitutional principles to the facts of a case is subject to *de novo* review. ***Id.*** at 114.

¶14 The trial court determined that Anthony forfeited his right to testify in his defense based on Anthony's incessant refusal to accept the trial court's preliminary ruling that Anthony was to answer "two" if asked about the number of his prior convictions. The trial court attempted multiple times to explain the irrelevance of Anthony's 1966 conviction; however, each explanation attempt was met with Anthony's refusal to comply with the trial court's ruling. After noting Anthony's physical agitation, irrelevant rants and refusal to comply with the trial court's order, the trial court ultimately determined that Anthony forfeited his right to testify in his defense.

¶15 Anthony's defense counsel then made an offer of proof to the trial court, explaining that Anthony intended to testify that he stabbed S.J. in self-defense. Specifically, defense counsel stated that, if permitted to testify, Anthony would explain that he brought an ice pick into the bedroom he shared with S.J. because he thought S.J. had a knife in her hand. Anthony would also tell the jury that he stabbed S.J. repeatedly because he was unsure whether the threat against him was eliminated and that he fled after the stabbing out of fear of the police. The trial court upheld its decision to bar Anthony from testifying.

¶16 A criminal defendant may lose fundamental rights (such as the right to appear at the trial and confront the accusers) when the defendant forfeits those rights by interfering with the ability of the trial court to protect those rights. *See* ***Illinois v. Allen***, 397 U.S. 337, 343 (1970). By refusing to comply with the trial court's order, exhibiting defiant and agitated behavior, and ranting about irrelevant topics, Anthony forced the trial court to decide whether the jury should be allowed to hear Anthony discuss irrelevant matters and potentially see Anthony lose his temper on the stand. We do not, however, decide whether Anthony forfeited his right to testify; rather, we conclude that even if the trial court should have permitted Anthony to testify, the refusal to do so was harmless.

¶17 The harmless error analysis requires us to review the entire record. ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***Id.*** A "reasonable possibility" is one sufficient to undermine our confidence in the outcome. ***Id.***

¶18 Anthony alleges that the violation of his right to testify was not harmless because it prevented him from presenting his self-defense claims to the jury. Anthony's defense counsel told the trial court that if permitted to testify, Anthony would explain that he became "fearful and afraid" during a physical altercation between S.J. and himself because he thought S.J. picked up a knife. Anthony would tell the jury that he brought an ice pick to his bedroom to defend himself and ultimately stabbed S.J. repeatedly because "he did not realize or understand that the threat had previously been terminated."

¶19 The State presented evidence, through multiple witnesses, detailing S.J.'s physical condition prior to the stabbing, S.J.'s autopsy results, Anthony's behavior before the stabbing, and Anthony's behavior after the stabbing.

¶20 Christopher Poulos, an assistant medical examiner for Milwaukee County, performed S.J.'s autopsy. Poulos told the jury that S.J. was five feet, seven inches tall and weighed 139 pounds. He also testified that S.J. was stabbed 45 separate times, had four broken ribs, and multiple abrasions and contusions. Poulos also said that 16 of the 45 puncture wounds were to the left side of S.J.'s chest and penetrated three to four inches into her body. Five of the wounds caused 400 milliliters of blood to pool on the left side of S.J.'s chest, and 250 milliliters of blood to surround her heart.

¶21 Sandra Rasco, an upstairs tenant in S.J.'s and Anthony's building, told the jury that on August 18, 2010, S.J. told Rasco that Anthony threatened to take her (S.J.) to the woods to kill her. S.J. told Rasco that Anthony had put an ice pick to her (S.J.'s) throat when he made the threat. Rasco told the jury that the following evening, she heard S.J. and Anthony arguing. During the argument, Rasco's daughter told Rasco that S.J.'s daughter said Anthony was chasing S.J. with an ice pick. Rasco went downstairs and advised S.J.'s daughters to call the police. She said that the daughters refused to call the police and went to look for S.J., who had left the apartment. Rasco eventually found S.J. and Anthony, who were still arguing, and went back to her apartment to wait for S.J. Eventually, Rasco said, S.J. and Anthony came back to their apartment, where the arguing continued. Rasco convinced S.J.'s daughter to call the police, but soon after heard "complete silence." She then saw Anthony leave the apartment. Rasco also told the jury that S.J. suffered from rheumatoid arthritis, used a walker, and

occasionally walked with a limp. Rasco testified that because of the arthritis, S.J. would have been unable to grip a knife.

¶22 Janet Mayfield, the mother of Anthony's teenage son, testified that immediately after the stabbing, Anthony went to Mayfield's home and confessed that he stabbed S.J. "forty to fifty times." Mayfield told the jury that Anthony suspected S.J. was having an affair with their next-door neighbor and "Anubis told him to do it." Mayfield stated that "Anubis" was "[s]ome ancient Egyptian god." Mayfield also said that Anthony admitted he "snap[ped]," and said he was going to return to the apartment building to kill the next-door neighbor and Rasco. Mayfield said that Anthony never mentioned acting in self-defense, or even that S.J. tried to attack him with a knife.

¶23 L.J., S.J.'s daughter, testified that she heard Anthony threaten to kill her mother that evening while holding an ice pick. R.J., S.J. and Anthony's daughter, testified that she saw Anthony enter his bedroom with an ice pick in his hand and shortly after heard her mother yelling "stop, please stop."

¶24 Even if Anthony had testified about his self-defense claim, an overwhelming amount of evidence would have undermined his theory. We are not persuaded that the result of Anthony's trial would probably have been different had the jury heard his testimony. Any error from Anthony's failure to testify was harmless.

## II. *Batson* Challenge.

¶25 Anthony also contends that the trial court erroneously allowed the State to peremptorily strike Juror Number 34, the sole African-American male on the jury panel, because the strike was a violation of ***Batson***. Specifically, Anthony

argues that the State struck Juror Number 34 based solely on his religion. We conclude, under the facts of this case, that the trial court properly allowed the State to strike Juror Number 34.

¶26 In ***Batson***, the United States Supreme Court held that: "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." ***Id.***, 476 U.S. at 89. The court outlined a three-step process for determining whether a prosecutor's peremptory strikes violated the Equal Protection Clause. *See* ***id.*** at 96-98. The test has been adopted in Wisconsin. *See* ***State v. Davidson***, 166 Wis. 2d 35, 39-40, 479 N.W.2d 181 (Ct. App. 1991). First, the defendant must establish a *prima facie* case of discriminatory intent by showing that the prosecutor relied on race in exercising the peremptory strike. *See* ***State v. King***, 215 Wis. 2d 295, 300-01, 572 N.W.2d 530 (Ct. App. 1997). Next, the State must offer a race-neutral reason for the strike. ***Batson***, 476 U.S. at 97. The prosecutor's explanation must be "clear, reasonably specific, and related to the case at hand[,]" however, it "need not rise to the level of justifying exercise of a strike for cause." ***State v. Lamon***, 2003 WI 78, ¶29, 262 Wis. 2d 747, 664 N.W.2d 607. Finally, the trial court must weigh the credibility of the testimony and determine whether purposeful discrimination has been established. ***Id.***, ¶32.

¶27 When reviewing a ***Batson*** violation claim, the standard of review is whether the trial court's determinations are clearly erroneous. ***Lamon***, 262 Wis. 2d 747, ¶43. Although there is an exception to the standard of review of giving deference to the trial court's ruling, it does not come into play here because the trial court observed first-hand the selection process and heard and assessed the

prosecutor's explanation. *Cf.* ***Holder v. Welborn***, 60 F.3d 383, 388 (7th Cir. 1995). Thus, we apply a deferential standard of review.

¶28 Anthony argues that the rationale put forth in ***Batson*** should be applied in this case, because he contends that Juror Number 34 was ultimately struck on the basis of religion. After reviewing the record, we are satisfied that the trial court properly applied the third step of the ***Batson*** test. The third step requires that 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." ***Lamon***, 262 Wis. 2d 747, ¶32. Here, the trial court believed the State's explanation for striking Juror Number 34, stating:

> I assessed [the State's] credibility in the way he gave his explanation. I assessed whether there was a regular practice among prosecutors of—and for that matter defense attorneys—of striking people who work their faith, and it seemed to me to be not only plausible but [a] legitimate, widely-accepted basis for exercising peremptory strike.
>
> ….
>
> I'm persuaded that [the State] … gave an honest, candid and legitimate reason for striking a juror that has nothing to do with his race. If that was a Sister of St. Francis that was sitting back there, if that was a nun in the Daughters of Charity, if that was a Lutheran minister, if that was faith healer, if that a Native American shaman back there and [the State] struck that person for that reason because they were afraid their spiritual sympathies might work against the State I would say that was a legitimate use of a peremptory strike.
>
> ….
>
> [I]f [the State] struck everybody simply because of their faith, [if] he asked every juror what their faith was, if they were all Christians they all go you might have a problem, but it's the faith and action here that I think is different, and a person who actually works in an occupation where they

> put their faith to work like this may create sympathies, may create attitudes, may create biases that are I think a perfectly plausible subject for peremptory strike, so the ***Batson*** objection is overruled.

(Bolding and italics added.)

¶29 Anthony correctly notes that courts around the country are divided over whether ***Batson*** may be expanded to prevent the use of juror strikes on the basis of religion. However, this is a question that we need not address because the trial court thoroughly explained that Juror Number 34 was not struck because of the faith he practiced—something the record is silent about—but rather, because Juror Number 34's occupation required him to apply his faith to his daily interactions, decisions, and activities. Thus, the trial court reasoned, there existed a significant possibility that Juror Number 34 would rely more on his faith than on the evidence in deciding this case. As such, we conclude that the trial court did not erroneously exercise its discretion.

**III. Ineffective Assistance of Counsel.**

¶30 Alternatively, Anthony argues that his defense counsel was ineffective for failing to raise either an argument that Anthony had a constitutional right to testify that could not be preempted, or that the exclusion of Juror Number 34 was a ***Batson*** violation.

¶31 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697. With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must

affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***id.*** at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶32 We have already explained why the trial court's refusal to let Anthony testify, if erroneous, was harmless. We have also explained why the exclusion of Juror Number 34 was not in violation of ***Batson***. Moreover, the trial court explained that even if Anthony's defense counsel had made the arguments Anthony complains were not made, defense counsel would not have been successful. Accordingly, defense counsel's performance was neither deficient nor prejudicial. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (defense counsel is not ineffective for failing to pursue meritless claims).

¶33 For the foregoing reasons, we affirm the trial court.

*By the Court*.—Judgment and order affirmed.

Not recommended for publication in the official reports.