

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

September 4, 1997

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. 96-2570-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRELL L. GARNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Derrell Garner appeals a judgment convicting him of three counts of first-degree sexual assault of a child. The issue is whether the prosecutor's jury selection tactics violated Garner's equal protection rights, and whether the jury heard sufficient identification testimony to convict Garner. We

conclude that Garner waived the first issue, and that he was sufficiently identified as the perpetrator. We therefore affirm.

A jury panel of twelve women and eleven men was present when the attorneys exercised their peremptory challenges. The prosecutor used all five of his challenges to exclude men. Garner's counsel objected on grounds that the challenges were gender based, in violation of his client's equal protection rights. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127-29 (1994). The trial court directed the prosecutor to explain his challenges and he explained that he struck three jurors because they failed to respond to any of the questions posed to them. The other two men gave responses the prosecutor deemed adverse to the prosecution. The trial court found that the prosecutor sufficiently explained the strikes, and held that they were not gender based. The trial proceeded with a jury made up predominantly of women.¹

Courts must follow a three-step process when reviewing a claim that a party has exercised peremptory strikes in a purposefully discriminatory manner:

First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of [gender]. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a [gender]-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, 358-359 (1991) (citations omitted). Here, the trial court implicitly concluded that Garner had made a prima facie showing

¹ Garner assumes the prosecutor's motive was his belief that women jurors are more prone to convict when the victims are children.

when it required the prosecutor to give an explanation of the State's strikes. Following that explanation, the court gave Garner's counsel the opportunity to respond, which counsel declined. The court then accepted the State's explanation as stating "sufficient reasons as to their strikes."

Garner thus failed to properly preserve the jury selection issue for appeal. He claims on appeal that the three jurors struck for unresponsiveness were actually, in fact, quite responsive to several questions. Therefore, in Garner's view, the trial court's ruling on his objection was based on an error of fact. However, we do not review issues on appeal that could have been disposed of in the trial court had they been raised there. *Gebhardt Bros., Inc. v. Brimmel*, 31 Wis.2d 581, 583, 143 N.W.2d 479, 480 (1966). Put another way, the objecting party must give the trial court an opportunity to correct its errors. *Herkert v. Stauber*, 106 Wis.2d 545, 560, 317 N.W.2d 834, 841 (1982).

Here, Garner's counsel said nothing after the State explained its peremptory strikes. If that explanation was, in fact, based on factual misstatements, Garner could and should have said so then, not for the first time on appeal. He cannot now claim to have met his burden to prove purposeful discrimination when he failed to present the trial court with any facts or argument that would refute the State's explanation.

The jury heard sufficient evidence to identify Garner as the perpetrator of the assaults. Garner contends that he was not sufficiently identified because none of the witnesses at trial made an in-court identification of him. However, two of the child victims testified that the perpetrator was in the courtroom, and, according to the trial court, one of the children looked at Garner when so stating. All three victims named their assailant "Derrell" and identified

him as the man who lived with their mother. The mother then confirmed that a Derrell Garner lived with her. From this testimony, the jury could reasonably infer that the Derrell Garner on trial was the same Derrell Garner who assaulted the children while living with them and their mother. A courtroom identification is unnecessary if other evidence reasonably allows the inference that the defendant on trial is the person who committed the charged acts. *United States v. Morrow*, 925 F.2d 779, 781 (4th Cir. 1991).

By the Court.—Judgment affirmed.

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

