COURT OF APPEALS DECISION DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-0004-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Green appeals from the judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child,

and kidnapping while armed with a dangerous weapon.[1] He also appeals from the orders denying his motion for postconviction relief. He contends that the trial court erred in denying his motion for a ***Machner*** hearing.[2] Specifically, he claims that his trial counsel was ineffective for: (1) failing to object to the State's use of three of its four peremptory strikes to remove males from the jury; (2) failing to request an additional peremptory strike because the court impaneled an alternate; and (3) failing to impeach the victim with two potential sources of evidence. We affirm.

I. BACKGROUND

¶2 On September 20, 1996, Carmelita W., a high school student, went to Green for hairstyling. To avoid paying the fee for use of the salon, Green provided the hairstyling services at a friend's home. On arrival at the residence, Green collected twenty-six dollars from Carmelita, and then washed her hair in the kitchen sink. While Green was blow drying Carmelita's hair, the electrical fuses blew out several times, leaving the home without electricity. After the third or fourth time the fuses blew, Green asked a neighbor, Olether Thomas, if he could continue styling Carmelita's hair at her house. Thomas agreed, and Green and Carmelita went across the street to Thomas's residence.

¶3 Carmelita testified that while she and Green were at the neighbor's house, Green claimed he needed more styling spritz and left for five to ten minutes to buy it. When Green returned, he told Carmelita that he could not find the spritz

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[1] Green was also found to be a habitual criminal as defined in WIS. STAT. § 939.62 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

he wanted. He requested more money from her but, when Carmelita said she did not have any, Green continued to style her hair.

¶4 Shortly thereafter, Green and Carmelita learned that the electricity had been restored at the home across the street, and the two returned there. Carmelita testified that soon after they returned to that residence, Green resumed curling her hair and the two began conversing. Green asked her if she "had ever had [her] pussy sucked" and then grabbed her breast. Carmelita said that she "jumped up" from the kitchen chair where she had been sitting and tried to run toward the front door. Green caught her, restrained her, threatened her life, threatened to sexually assault her, and cut her several times with his barber's scissors. Carmelita said that she hit him in the face, and Green suddenly "stopped and said he was sorry . . . and that he was on . . . cocaine."

¶5 In his postconviction motion, Green claimed that counsel was ineffective for failing: (1) to raise a ***Batson***[3] objection; (2) to ensure that he receive all of the peremptory strikes to which he was entitled; and (3) to impeach Carmelita with the alleged discrepancies in her testimony.

¶6 Voir dire was not reported.[4] With its peremptory strikes, the State removed three males and one female. The defense also removed three males and one female. The jury consisted of one male and twelve females; one of the

[3] *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[4] At the time of trial, Supreme Court Rule 71.01(2)(f) did not require reporting of voir dire. Shortly thereafter, however, SCR 71.01 was repealed and recreated, effective January 1, 1998, to require reporting of "[a]ll proceedings in the circuit court . . ., except . . . a proceeding before a court commissioner that may be reviewed de novo; . . . [s]ettlement conferences, pretrial conferences, and matters relating to scheduling; . . . [and in a] criminal proceeding, a matter preceding the filing of a criminal complaint."

females was ultimately designated as the alternate. Apparently, neither the trial court nor either lawyer noted the need for each side to have an additional peremptory strike in light of the fact that an alternate juror would be selected.

¶7 In reviewing Green's motion, the trial court concluded that Green's allegations were conclusory, and lacked any "meaningful factual assertion which would allow the court to meaningfully assess a claim that he was prejudiced by counsel's failure to object to the State's strikes." In addition, the court noted that Green's motion for a new trial based on his claim that counsel failed to impeach the victim was also without merit. The court concluded that the offered submissions contradicting the victim's testimony were insignificant in light of the totality of the trial evidence. Accordingly, the trial court denied Green's motion without a hearing.

II. ANALYSIS

¶8 Green first claims that the trial court erred in denying his request for a ***Machner*** hearing on his claim that trial counsel was ineffective for failing to object to the prosecutor's use of peremptory strikes. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). We disagree.

¶9 If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review de novo. *See* ***id.*** However, if the defendant fails to allege sufficient facts in the motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court

may in the exercise of discretion deny the motion without a hearing. *See* ***id.***, 201 Wis.2d at 309-310. We will reverse the trial court's decision to deny an evidentiary hearing only if the trial court erroneously exercised discretion. *See* ***id.*** at 311.

¶10 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232-236, 548 N.W.2d 69 (1996). If this court concludes that the defendant has failed to establish that counsel was deficient, we need not address whether the defendant was prejudiced by counsel's actions. *See* ***Strickland***, 466 U.S. at 697. To prove deficient performance, a defendant must identify specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Counsel's performance is to be evaluated from counsel's perspective at the time of the challenged conduct. *See* ***id.*** at 690. Counsel is presumed to have rendered effective assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See* ***id.*** To show 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so,

whether the deficient performance prejudiced the defendant are questions of law, which we review de novo. *See* ***Pitsch***, 124 Wis. 2d at 634.

¶11 "Purposeful racial and gender discrimination in jury selection violates a litigant's right to equal protection because it denies him or her the protection that a trial by jury is intended to secure." ***State v. Joe C.***, 186 Wis. 2d 580, 585, 522 N.W.2d 222 (Ct. App. 1994). The rule enunciated in ***Batson*** also extends to peremptory strikes based on a veniremember's gender. *See* ***State v. Jagodinsky***, 209 Wis. 2d 577, 579-80, 563 N.W.2d 188 (Ct. App. 1997). When raising a ***Batson*** objection to the prosecution's use of its peremptory strikes, the defendant must make a *prima facie* showing of purposeful discrimination by establishing that the prosecution has exercised peremptory challenges on the basis of race or gender. *See* ***id.*** at 580. Once the defendant has done so, the burden shifts to the prosecution to articulate race or gender-neutral reasons for striking the jurors. *See* ***id.*** The trial court must then decide whether the defendant has proven purposeful discrimination by the prosecution. *See* ***id.***

¶12 Green's postconviction motion fails to allege sufficient facts which would entitle him to relief on his ***Batson*** based claim of ineffective assistance of counsel. In his postconviction motion, Green alleged:

> During the jury selection process, the State used 3 of its 4 available peremptory strikes to remove males from the jury panel. Defense counsel did not object or argue that the prosecutor's actions provided a *prima facie* case of purposeful discrimination against a cognizable group—males—requiring the State to offer a gender-neutral justification for each male venireperson's removal. This failure constituted ineffective assistance of counsel[.]

In addition, he alleged that defense counsel used three of four of his peremptory strikes to remove male venirepersons, resulting in a jury panel composed of eleven

females and one male, which he claims denied him his equal protection rights. We reject his claim.

¶13 First, Green cites no authority to support his premise that removing three males and a female could establish the *prima facie* evidence to cross the ***Batson*** threshold. Second, Green's motion does not claim that counsel did not have a strategic reason for not raising a ***Batson*** objection, nor does the motion allege that the male veniremembers who were struck from the panel were similarly situated to the women who were left on the panel. Moreover, because voir dire was not reported, we have no basis on which to assess the personal backgrounds of the jurors. Thus, Green's motion fails to allege sufficient facts to warrant a hearing. Consequently, we conclude that the trial court properly denied his motion without a hearing.

¶14 Green next argues that trial counsel was ineffective because he failed to ensure that Green receive the full number of peremptory challenges to which he was statutorily entitled. We disagree.

¶15 Pursuant to WIS. STAT. § 972.03, each side is entitled to one additional peremptory challenge when an alternate juror is selected.[5] The record

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[5] WISCONSIN STAT. § 972.03 provides:

> Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment, the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment, the total peremptory challenges allowed the defense shall not exceed 12 if there are only 2 defendants and 18 if there are more than 2 defendants; in other felony cases 6

(continued)

reveals that although an alternate juror was selected, neither party received an additional peremptory challenge. Green argues that his counsel was deficient for failing to request the additional peremptory challenge. Green does not assert that he did not receive a fair trial by an impartial jury; rather, he asserts that we should presume that he was prejudiced because he did not receive the full number of peremptory challenges to which he was statutorily entitled.

¶16 We decline to presume prejudice. Both Green and the State received the same number of peremptory challenges, and the Wisconsin Supreme Court recently concluded that prejudice should not be presumed in these circumstances. *See* ***State v. Erickson***, 227 Wis. 2d 758, 772, 596 N.W.2d 749 (1999), *cert. denied*, 120 S. Ct. 987 (2000) ("[W]e decline Erickson's invitation to presume prejudice every time the defendant does not get the number of peremptory strikes allowed by statute but the State and the defendant get an equal number of peremptory strikes."). Consequently, the trial court properly rejected Green's claim that he received ineffective assistance of counsel.

¶17 Green also claims that counsel was ineffective for failing to impeach the victim: (1) on her estimate of the duration of time that Green was absent from Thomas's home to either purchase hair spritz, as he claimed, or to obtain drugs, as the State surmised; and (2) on her description of the manner in which Green restrained her. We reject his claims.

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challenges if there are only 2 defendants and 9 challenges if there are more than 2. In misdemeanor cases, the state is entitled to 3 peremptory challenges and the defendant is entitled to 3 peremptory challenges, except that if there are 2 defendants, the court shall allow the defense 4 peremptory challenges, and if there are more than 2 defendants, the court shall allow the defense 6 peremptory challenges. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04(1) [(authorizing court to impanel additional jurors)].

¶18 Green contends counsel should have presented testimony from Olether Thomas who, Green says, would have testified that he was absent from her home for only one to five minutes to purchase spritz. The State responds that Green's contention is based on a misreading of the record. As the State explains, Carmelita testified that Green was gone "5 or 10 minutes." The witness whom defense counsel failed to locate and call for Green's trial allegedly would have testified that Green was gone for one to five minutes. The State notes, however, that Green, in his argument to this court, has referred to Carmelita's statement to a Milwaukee police officer in which she noted an approximate twenty-minute absence; that, however, was not Carmelita's trial testimony. Because Carmelita never testified that Green was absent for twenty minutes to buy spritz, and because the prosecutor never used this time estimate, or any other for that matter, to bolster the theory that Green had bought and used drugs before sexually assaulting Carmelita, testimony from Thomas indicating that Green was gone for one to five minutes would not have impeached Carmelita. Green offers no reply to the State's response. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

¶19 Similarly, Green overstates Carmelita's allegedly contradictory testimony regarding Green's restraint of her. Green contends that Carmelita's trial testimony regarding whether Green restrained her with a leg chokehold contradicted her testimony at his parole revocation hearing. At trial, Carmelita testified that Green put her in a chokehold using his leg, but at the revocation hearing two months prior to trial, she said that she could not recall if he had done so, and explained that she could not remember the specifics because she had worked hard at "get[ting] everything out of [her] head." On appeal, Green

contends that counsel should have used the testimony from the revocation hearing to impeach Carmelita. As the State explains, however, Carmelita's recollection when she testified at trial almost two months after the revocation hearing was aided by her review of her preliminary hearing testimony in which she stated that Green had used a leg to chokehold her. Moreover, given the strong circumstantial evidence corroborating Carmelita's testimony that Green assaulted her, and given the implausibility of the defense claim that she falsely accused Green because she was dissatisfied with the hairstyle he gave her, we conclude that no reasonable possibility exists that Green was prejudiced by his attorney's alleged failure to use Carmelita's revocation hearing testimony to impeach her at trial. The trial court correctly denied Green's postconviction motion, without holding a hearing.

By the Court.—Judgment and orders affirmed.

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