COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1258-CR **Cir. Ct. No. 2008CF1394**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN J. MARQUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Juan J. Marquez appeals from a judgment of conviction for two counts of first-degree sexual assault of a child under the age of

thirteen. WIS. STAT. § 948.02(1)(e) (2005-06)[1]. Marquez argues that the circuit court failed to properly instruct the jury, and that we should, therefore, exercise our discretionary power to reverse the judgment of conviction. He also argues that the State engaged in purposeful discrimination when it used peremptory strikes against two jurors. We are not persuaded that the real controversy was not tried or that the interests of justice require reversal, and we decline to exercise our discretionary power of reversal. We also conclude that the circuit court's finding that the State offered facially valid reasons for exercising peremptory strikes against the two jurors was not clearly erroneous. Consequently, we affirm the judgment of the circuit court.

¶2 Marquez raises two arguments in this appeal and we discuss the facts relevant to each issue in turn. First, we consider whether the court erred by failing to give the jury instruction that addresses when a defendant's statement is recorded by police but the recording is not produced at trial.

¶3 When Marquez was questioned by the police, the police recorded his statement. During the interrogation, Marquez made both inculpatory and exculpatory statements. Although the statement was actually recorded, the police were not able to recover the recording from their computer, and consequently, the recording could not be played at Marquez's trial. Instead, the police officer who interrogated Marquez testified about what Marquez said. Marquez also testified at trial. Prior to trial, the State asked the court to give WIS JI—CRIMINAL 180,

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

which explains that the jury may consider the absence of a recording when evaluating evidence from an interrogation. When the court actually instructed the jury, however, it did not include WIS JI—CRIMINAL 180. Marquez did not object to the court's failure to give the instruction.

¶4 Marquez's first argument is that he is entitled to a new trial because the circuit court erred when it did not give WIS JI—CRIMINAL 180, the court's failure to give the instruction violated WIS. STAT. § 972.115(2)(a) (2009-10), and the result of the trial would have been different if the jury had been given the instruction. The statute provides that if a statement made by a defendant during a custodial interrogation is admitted into evidence and if a recording of that statement is not available, "upon a request made by the defendant" the court shall instruct the jury that:

> [I]t is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and … the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case ….

Id.; WIS JI—CRIMINAL 180.

¶5 Marquez argues that because the instruction was not given, the jury was not told that it was their province to determine the weight to be given the police officer's testimony, and without the instruction, the jury may not have understood that it had the duty to evaluate the trustworthiness, weight, and credibility of the officer's testimony about what Marquez said during the interview. Marquez concludes that there is a reasonable probability that the result at trial would have been different if the jury had been given WIS JI—CRIMINAL 180.

¶6 We are not persuaded by Marquez's argument. The statute requires a court to give the instruction if the defendant requests it. WIS. STAT. § 972.115. In this case, Marquez did not ask the court to give the instruction. Rather, the State asked the court to give the instruction. The court ultimately did not give the instruction, and Marquez did not object when the court failed to do so. Marquez has not argued that his trial counsel was ineffective for failing to object when the instruction was not given. Instead, Marquez asks us to use our discretionary power under WIS. STAT. § 752.35 to reverse.

¶7 Under our discretionary power, we may reverse a judgment or order appealed from, regardless of whether a proper objection was made, for two reasons: (1) if it appears from the record that the real controversy has not been fully tried, or (2) it is probable that justice has for any reason miscarried. WIS. STAT. § 752.35. We may exercise our discretionary power to reverse under the first standard by considering the totality of the circumstances to determine whether a new trial is required "to accomplish the ends of justice because the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). We are not required under the first standard to determine that there is a substantial probability that a new trial would reach a different result. ***Wyss***, 124 Wis. 2d at 734-35. When we consider whether justice has miscarried, however, we must conclude that the defendant should not have been found guilty and that justice demands the defendant be given another trial. ***Id.*** at 736.

¶8 We are not persuaded that we should exercise our discretionary power to reverse under either standard. The basis of Marquez's argument is that without the instruction, the jury did not know that it was supposed to determine

the weight and credibility of the officer's testimony about the statements Marquez made to the police. Our review of the record shows, however, that the court instructed the jury that it was their duty to consider the weight of the evidence, to scrutinize the witnesses' testimony, and to determine the credibility of a witness and the weight to be given to each witness's testimony. These instructions allowed the jury to accurately assess the weight and credibility of the officer's testimony. In addition, Marquez's trial counsel suggested to the jury during closing argument that they did not need to believe the officer's testimony when she argued that the officer's testimony was not "reliable."

¶9 Based on this record, we conclude that the court's failure to give WIS JI—CRIMINAL 180 did not result in the real controversy not being tried or a miscarriage of justice. We also are not convinced that the outcome of the trial would have been different had the jury been given the instruction.

¶10 Marquez's second argument is that the circuit court erred when it determined that the State's reasons for its peremptory strikes of two potential jurors did not violate ***Batson v. Kentucky***, 476 U.S. 79 (1986). Marquez, who is Hispanic, raised a ***Batson*** challenge to the State's decision to use its peremptory strike against the only two Hispanic men on the jury panel. The State did not strike an Hispanic woman.

¶11 A prosecutor has a right to exercise a peremptory strike "for any reason related to the prosecutor's view of the case outcome." ***State v. Lamon***, 2003 WI 78, ¶25, 262 Wis. 2d 747, 664 N.W.2d 607. The prosecutor violates the Equal Protection Clause, however, if he or she exercises a peremptory strike based on a racially discriminatory intention or purpose. ***Id.***, ¶34. "[T]he Equal

Protection Clause is not violated simply because there is a racially discriminatory or disparate impact." ***Id.***

¶12 When considering whether there has been a ***Batson*** violation, the court applies a three-step analysis. First, a defendant who alleges that the State had a discriminatory intent in exercising a peremptory strike 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.

¶13 If the court finds, as it did here, that the defendant has made a prima facie case on this basis, the second-step of the analysis shifts the burden to the State to offer a neutral reason for exercising the peremptory strike. ***Id.***, ¶29. A neutral explanation is based on something other than the juror's race. ***Id.***, ¶30.

> Facial validity of the prosecutor's explanation is the issue. Unless discriminatory intent is inherent in the prosecutor's explanation, "the reason offered will be deemed race neutral." Unless the prosecutor exercised a peremptory strike with the intent of causing disparate impact, that impact itself does not violate the principle of race neutrality.

Id. (citations omitted). "The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand." ***Id.***, ¶29. The explanation need not "rise to the level of justifying exercise of a strike for cause." ***Id.*** The reason does not have to be persuasive or even plausible. ***Id.***, ¶31. "[E]ven a 'silly or superstitious' reason, if facially nondiscriminatory, satisfies the second step." ***Id.*** The prosecutor is, however, required to offer "race-neutral" reasons for exercising his or her discretion. *See* ***Id.***, ¶79. The fact that one of the jurors had the same name

as someone previously convicted of a crime is a neutral reason for exercising a peremptory challenge, as is a juror's familial relationship to people in the criminal justice system. ***Id.***, ¶81.

¶14 The third-step of the analysis requires the court to evaluate the credibility of the prosecutor's explanation, and determine whether there was purposeful discrimination. ***Id.***, ¶32. At this point, the burden shifts back to the defendant to persuade the court that the prosecutor's explanations "were a pretext for intentional discrimination." ***Id.***

¶15 We review the circuit court's finding of whether the prosecutor had the discriminatory intent necessary to support a ***Batson*** challenge as a finding of historical fact. ***Lamon***, 262 Wis. 2d 747, ¶45. Consequently, we will not overturn the circuit court's finding unless it is clearly erroneous. ***Id.***

¶16 After the jury members had been selected, Marquez challenged the State's decision to strike the two Hispanic men on the jury panel. The court concluded that the facts of the case were sufficient to switch the burden to the State to show that the peremptory strikes were made for reasons other than race or national origin.

¶17 The State explained that it had used a peremptory strike against the first juror because he said he had a family member who had been convicted of a similar crime and because the court's electronic records showed criminal convictions for people with the same first and last name as the juror. Marquez responded that the first juror's name was a common Hispanic name, similar to John Smith, and there was no indication from the court's records that the juror actually had a criminal record.

¶18 As to the second juror, the State said that it was their last peremptory strike, and that they struck the juror because he had said he did not have any experience with children. The State noted that defense counsel had tried to rehabilitate that juror by asking if he had family members who had children. The juror responded that he had family with children in Florida, who he saw once a year. The prosecutor then explained that she had used a peremptory strike against the second juror "based on his occupation and lack of contacts with children in a family nature, either of himself or a close family setting" because "he would not be the best witness [sic] to draw on his common and sense and life experiences with the two primary witnesses of the State being children ages eight and ten." The State went on to note that it did not strike another juror who had identified herself as Hispanic and had two young children.[2] Marquez argued that there were other members of the jury panel who also did not have experience with children but the State did not strike them.

[2] During voir dire, defense counsel asked the two Hispanic men if there were differences in the way children are treated in Latin American cultures. The first juror said that there was a "closer bond with Hispanic [families]… It's just more closer in general. I can't really describe it." Counsel went on to ask if there was a specific cultural difference such as "more of hugging." The juror agreed. Counsel asked the second juror if he agreed that people from the Latin American culture "do tend to hug and say hello to children by hugging them?" The second juror agreed. Counsel then noted that the Hispanic woman juror, who the State did not strike, was nodding her head and asked her if she agreed with that statement .

When denying the challenge under ***Batson v. Kentucky***, 476 U.S. 79 (1986), the circuit court noted that defense counsel "spent a great deal of time during her voir dire trying to point out how close-knit the Hispanic family is compared to Caucasian families, which would imply that someone in a Hispanic family would feel much more empathy, much closer ties to other family members." The court concluded that those two factors together suggested that the juror could not be fair. The State noted that it had not used peremptory strikes because of defense counsel's comments that Hispanic families are more closely knit. The court acknowledged that the State had not done so, but said that defense counsel's comments raised the inference that the juror could not be fair.

¶19 The court determined that the State used a strike against the first juror because he had said that he had a family member who had been convicted of a similar crime. The court found that to be a facially neutral reason.

¶20 As to the second juror, the court considered that the State said it had used a strike against him because he did not have experience with children. The court noted that such experience was not necessary to understand the affect of a sexual assault on a child, but because the State's case rested on the testimony of child victims, such experience could be relevant, and that "potential jurors who have children or grandchildren would be in a better position than someone who is childless to accurately evaluate the testimony of a child witness." The court noted that the State's reason for the strike need not rise to the level of a strike for cause, and determined that the State had given a valid, neutral reason for striking the second juror.

¶21 Marquez argues on appeal that the State's decision to strike the two jurors shows "purposeful discrimination." Marquez also argues that the State's reasons are suspect because the reasons the State offered for striking the two Hispanic jurors applied to the other non-Hispanic jurors who the State did not strike. Specifically, Marquez says that the State struck the first juror, in part, because a family member had been convicted of a sexual assault, yet did not strike another, non-Hispanic juror whose friend had been convicted of a sexual assault.

¶22 There was, however, an important difference between the two. The first juror's family member was convicted of having sex with a minor, a crime similar to the issue charged against Marquez. The other juror's friend, however, was convicted of a crime involving pornography. We conclude that the State

offered a facially neutral reason for using a peremptory strike against the first juror.

¶23 Marquez also argues that the State showed purposeful discrimination when it struck the second juror because he did not have experience with children, yet did not strike other non-Hispanic male jurors who also did not have experience with children. The questions asked during voir dire established that the juror did not have experience with children. Further, the record shows that the State did not strike the Hispanic woman on the panel who had two young children. We again agree with the circuit court that this was a valid reason for striking the second juror.

¶24 As the circuit court found, the prosecutor offered reasons for striking both the jurors that were unrelated to their ethnic background. The circuit court assessed the prosecutor's credibility, as it was required to do, and found that the reasons were valid. We are not persuaded that the circuit court's findings were clearly erroneous. For these reasons, we affirm the judgment of the circuit court.

By the Court.—Affirmed.

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