COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

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.

NOTICE

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No. 94-3036-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD RAMOS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded for a new trial*.

Before Wedemeyer, P.J., Schudson, J., and Michael T. Sullivan, Reserve Judge.

SULLIVAN, J. Edward Ramos appeals from a judgment of conviction, after a jury trial, for first-degree intentional homicide. At issue in this case is whether the trial court's failure to dismiss a prospective juror during *voir dire*, who the State concedes on appeal should have been removed for cause,

but who was subsequently removed by the defendant's use of a peremptory challenge, was a violation of the defendant's procedural due process rights under the Fourteenth Amendment to the United States Constitution.[1]

Because Wisconsin law entitled Ramos to seven peremptory challenges in this case, *see* § 972.03, STATS., and because trial court error arbitrarily deprived him of the effective use of one of those challenges, we conclude that Ramos was denied due process under the Fourteenth Amendment. Accordingly, we reverse.

I. BACKGROUND.

The underlying facts in this case are tragic. Police arrested Ramos for the smothering death of his girlfriend's two-year-old child. The State charged him with first-degree intentional homicide; Ramos opted for a jury trial. Ramos never denied that he killed the child, but argued that he acted recklessly—not intentionally. Due to the sensitive nature of the offense, prospective jurors were carefully questioned by both Ramos's counsel and the State on their ability to be fair and impartial. During Ramos's counsel's questioning of one prospective juror, the juror stated, "[K]nowing that the child was suffocated, I guess I couldn't be fair." Then when the juror was specifically asked whether she could be fair to Ramos, she stated, "No." During an *in camera* conference, Ramos's counsel moved to strike the juror for cause, arguing that the juror stated she could not be fair and impartial. The prosecutor disagreed with Ramos's counsel's recollection of the juror's statement, and argued that the juror merely stated that "she would be more sympathetic but she couldn't tell until she heard all the evidence." The trial court agreed with the prosecutor's erroneous version of the juror's statement and denied Ramos's motion to strike the juror for cause. Regrettably, the trial court also denied Ramos's request to have the court reporter read back the juror's responses to the questions.

[1] Ramos raises a secondary issue concerning the trial court's denial of his mistrial motion after a State witness referenced Ramos's probationer status at trial. Because we resolve this appeal on other grounds, we need not address this argument. *See* ***State v. Dwyer,*** 181 Wis.2d 826, 830, 512 N.W.2d 233, 234 (Ct. App. 1994) (only dispositive issues need to be addressed).

Ramos subsequently removed the juror through the use of his first peremptory challenge; therefore, the juror did not sit in judgment at Ramos's trial. After four days of trial, a jury found Ramos guilty of first-degree intentional homicide.

II. ANALYSIS.

In its appellate brief, the State concedes that the trial court erroneously exercised its discretion in denying Ramos's motion to strike the prospective juror for cause. *See* ***State v. Zurfluh,*** 134 Wis.2d 436, 438, 397 N.W.2d 154, 154 (Ct. App. 1986) (whether to dismiss a proposed juror for cause lies within the wide discretion of the trial court). The State agrees with Ramos that the prospective juror, after initially giving equivocal answers, stated that she could not be fair. Further, the State concedes that further questioning did not establish that the prospective juror could put aside her bias and be "indifferent in the case." *See* § 805.08(1), STATS.[2] While we are not bound by the State's concession of error, *see* ***State v. Gomaz***, 141 Wis.2d 302, 307, 414 N.W.2d 626, 629 (1987), our review of the record confirms that the trial court erroneously exercised its discretion when it failed to dismiss the prospective juror for cause. The prospective juror unequivocally stated that she could not be fair as a juror. Given this error, we must next consider whether Ramos is entitled to a new trial.

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[2] Section 805.08(1), STATS., provides in relevant part:

> **Jurors. (1)** QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

The State contends that despite trial court error, Ramos is not entitled to a new trial because the prospective juror was struck from the panel by Ramos's use of a peremptory challenge and thus the jury that actually heard his case was impartial. This case, however, is not about whether Ramos's right to a trial by an impartial jury under Article 1, Section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution was violated. The United States Supreme Court has conclusively spoken on that issue: "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." ***Ross v. Oklahoma,*** 487 U.S. 81, 88, 108 S. Ct. 2273, 2278, 101 L.Ed.2d 80, 90 (1988). Thus, the loss of a peremptory challenge to correct a trial court error does not constitute a violation of the right to an impartial jury. ***Id.***; *see* ***State v. Traylor,*** 170 Wis.2d 393, 400, 489 N.W.2d 626, 629 (Ct. App. 1992) (applying ***Ross***'s holding to Wisconsin). What is at issue in this case, however, is whether the trial court's error in failing to dismiss a prospective juror for cause arbitrarily deprived Ramos of a full complement of his legislatively-entitled peremptory challenges, thereby violating his procedural due process rights under the Fourteenth Amendment. This is an issue of first impression in Wisconsin.

A. Procedural Due Process.

"The Fourteenth Amendment reads in part: `nor shall any State deprive any person of life, liberty, or property, without due process of law,' and protects `the individual against arbitrary action of government.'" ***Kentucky Dep't of Corrections v. Thompson,*** 490 U.S. 454, 459-60, 109 S. Ct. 1904, 1908, 104 L.Ed.2d 506, 514 (1989) (citation omitted). A protected liberty interest that does not arise directly from the Due Process Clause may nonetheless be created by state statutory enactment. *See* ***Hewitt v. Helms,*** 459 U.S. 460, 469, 103 S. Ct. 864, 870, 74 L.Ed.2d 675, 686 (1983). Further, the *arbitrary* deprivation of a liberty interest that state law provides is a violation of Fourteenth Amendment procedural due process. *See* ***Hicks v. Oklahoma,*** 447 U.S. 343, 346, 100 S. Ct. 2227, 2229, 65 L.Ed.2d 175, 180 (1980); ***Casteel v. McCaughtry,*** 176 Wis.2d 571, 579, 500 N.W.2d 277, 281 (discussing procedural due process claims), *cert. denied*, 114 S. Ct. 327, 126 L.Ed.2d 273 (1993).

"[P]eremptory challenges are not required by the Constitution." ***Mu'Min v. Virginia,*** 500 U.S. 415, 424-25, 111 S. Ct. 1899, 1905, 114 L.Ed.2d 493,

505 (1991). They are merely a creature of statute. ***Ross,*** 487 U.S. at 89, 108 S. Ct. at 2279, 101 L.Ed.2d at 90. Accordingly, "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." ***Id***. Hence, "the `right' to peremptory challenges is `denied or impaired' only if the defendant does not receive that which state law provides." ***Id***. at 89, 108 S. Ct. at 2279, 101 L.Ed.2d at 91.

In ***Ross,*** the Supreme Court addressed a Fourteenth Amendment procedural due process challenge identical to that raised here—an Oklahoma criminal defendant had to exercise a peremptory challenge to remove a juror whom the trial court should have dismissed for cause. ***Id***. at 88-89, 108 S. Ct. at 2278, 101 L.Ed.2d at 90. The defendant argued that the trial court's failure to remove the juror for cause violated his due process rights by "arbitrarily depriving him of the full complement of nine peremptory challenges allowed under Oklahoma law." ***Id***. The Court rejected the challenge by concluding that the defendant had "received all that was due under Oklahoma law." ***Id***. at 91, 108 S. Ct. at 2280, 101 L.Ed.2d at 92. The Court reached its decision by analyzing Oklahoma law. In Oklahoma:

> [A] defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.

Id. at 89, 108 S. Ct. at 2279, 101 L.Ed.2d at 91. The Court concluded that while the defendant "exercised one of his peremptory challenges to rectify the trial court's error, and consequently ... retained only eight peremptory challenges...[,] he received all that Oklahoma law allowed him" because Oklahoma law required him to expend peremptory challenges to cure trial court error in its for-cause rulings. ***Id***. at 90-91, 108 S. Ct. at 2279, 101 L.Ed.2d at 91. Hence, the defendant was not arbitrarily deprived of a liberty that Oklahoma law

provided; therefore, his procedural due process rights were not violated. ***Id***. at 91, 108 S. Ct. at 2279-80, 101 L.Ed.2d at 91-92.[3]

To evaluate properly Ramos's procedural due process claim, we must analyze Wisconsin's law on peremptory challenges to determine what state law provides criminal defendants. Section 972.03, STATS., provides in relevant part: "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.... Each side *shall be allowed* one additional peremptory challenge if additional jurors are to be impaneled under s. 972.04(1)." (Emphasis added.)[4] Section 972.04(1), STATS., prescribes the exercise of peremptory challenges:

> **Exercise of challenges. (1)** The number of jurors impaneled shall be 12 unless a lesser number has been stipulated and approved under s. 972.02 (2) or the court orders that additional jurors be impaneled. That number, plus the number of peremptory challenges available to all the parties, shall be called initially and maintained in the jury box by calling others to replace jurors excused for cause until all jurors have been examined. The parties shall thereupon exercise in their order, the state beginning, the peremptory challenges available to them, and if any party declines to challenge, the challenge shall be made by the clerk by lot.

It is undisputed that the above statutes *entitle* both the State and a criminal defendant to a specific number of peremptory challenges, dependant upon the

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[3] The Supreme Court did not decide "the broader question whether, in the absence of Oklahoma's limitation on the `right' to exercise peremptory challenges, `a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." ***Ross v. Oklahoma,*** 487 U.S. 81, 91 n.4, 108 S. Ct. 2273, 2281 n.4, 101 L.Ed.2d 80, 92 n.4 (1988).

[4] In this case two additional jurors were impaneled so each side was allowed seven peremptory challenges.

type of case being tried. We stress the word "entitle" because the statutory language of § 972.03—"is entitled" and "shall be allowed"—mandates that the State and Ramos each receive a specific number of peremptory challenges. *See* ***Wagner v. State Medical Examining Bd.,*** 181 Wis.2d 633, 643, 511 N.W.2d 874, 879 (1994) (declaring that "the word `shall' is presumed to be mandatory when it appears in a statute").[5]

Given the legislature's clear mandate, we conclude that Wisconsin's statutorily provided peremptory challenge is a protected liberty interest subject to procedural due process analysis. *See* ***Casteel,*** 176 Wis.2d at 579, 500 N.W.2d at 281 (stating that a court examining procedural due process questions must first ask whether there is a protected liberty interest). Indeed, "[t]he peremptory challenge is one of the most important of the rights secured to the accused." ***State v. Gesch,*** 167 Wis.2d 660, 671, 482 N.W.2d 99, 104 (1992).

Further, it is also clear in Wisconsin that a trial court's failure to dismiss a prospective juror who should have been removed for cause can interfere with and deprive a defendant of that protected liberty interest by requiring the defendant to exercise a peremptory challenge to remove that juror. *See* ***Casteel,*** 176 Wis.2d at 579, 500 N.W.2d at 281 (examining court must also determine whether state action interfered with protected liberty interest). Unlike the Oklahoma law at issue in ***Ross,*** Wisconsin law does not require a criminal defendant to use peremptory challenges to correct erroneous trial court rulings on for-cause challenges. *See* § 805.08(1), STATS. (providing standard for dismissing a prospective juror for cause; see *supra* note 2 for relevant statutory language). Indeed, the Wisconsin Supreme Court has refused to require that a criminal defendant exercise a peremptory challenge to correct a trial court's error to strike a juror for cause or face waiver of the issue.[6] ***Gesch,*** 167 Wis.2d at 671, 482 N.W.2d at 104.

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[5] We do note that the liberty at issue in this case is purely a function of statutory enactment; thus, the Wisconsin Legislature can alter the specifics of Wisconsin's peremptory challenge statute if it so chooses.

[6] Of course, it is possible that under the procedure provided in § 972.04(1), STATS., the State could remove the suspect juror through its peremptory challenges. In such a case, it is obvious that a defendant is not then deprived of a peremptory challenge by the trial court error. Likewise, if the defendant chooses not to exercise all of his or her peremptory challenges, it cannot be said that a

Given our conclusion that a trial court's error in failing to dismiss a juror for cause, in combination with the defendant's subsequent use of a peremptory challenge to remove that juror deprives a criminal defendant of a statutorily created liberty interest, we must next ask whether such a deprivation is arbitrary—that is, whether the defendant has received the minimal process that is due under the Fourteenth Amendment. *See* ***Hewitt,*** 459 U.S. at 472, 103 S. Ct. at 871, 74 L.Ed.2d at 688-89.

As stated above, "[t]he peremptory challenge is one of the most important of the rights secured to the accused." ***Gesch,*** 167 Wis.2d at 671, 482 N.W.2d at 104. Further, "it must be exercised with full freedom, or it fails of its full purpose." ***Lewis v. United States,*** 146 U.S. 370, 378, 13 S. Ct. 136, 139, 36 L.Ed.2d 1011, 1014 (1892) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *353). In light of the importance of this statutory right, procedural due process analysis requires that a criminal defendant receive non-arbitrary procedural protections if the right is to be diminished. *See* ***Hewitt,*** 459 U.S. at 473, 103 S. Ct. at 872, 74 L.Ed.2d at 689 (declaring court must consider *inter alia* defendant's interest involved and "the value of procedural requirements in determining what process is due under the Fourteenth Amendment"). A trial court error on a for-cause challenge that results in a deprivation of the effective use of a peremptory challenge provides no procedural protection—accordingly, it is, by definition, arbitrary.

Where a defendant must use a legislatively-entitled peremptory challenge to remove a potential juror who should have been dismissed by the trial court for cause, that defendant is arbitrarily deprived of a liberty that state law provides. *See* ***Ross,*** 487 U.S. at 89, 108 S. Ct. at 2279, 101 L.Ed.2d at 91. While the right to a peremptory challenge remains purely statutory, the arbitrary deprivation of that right does violate Fourteenth Amendment due process. Further, our supreme court has already stated the appropriate remedy for this procedural due process violation: "There is little doubt that if the trial court ... deprived [a defendant] of his right to the effective exercise of his peremptory challenges it would have provided grounds for a new trial." ***State v. Wyss,*** 124 Wis.2d 681, 724, 370 N.W.2d 745, 765 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990); *see also* ***Swain v. Alabama***, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L.Ed.2d 759, 772

(..continued)
trial court error on a for-cause challenge deprived the defendant of a peremptory challenge.

(1965) ("The denial or impairment of the right is reversible error without a showing of prejudice."), *overruled on other grounds by* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

Here, there is no question that the trial court erred when it failed to remove the potential juror for cause. It is also clear that Ramos exercised his first peremptory challenge to remove that prospective juror, and that he exercised all seven of his allotted peremptory challenges. Given these facts, we can reach only one conclusion—Ramos was arbitrarily deprived of the effective use of his full complement of peremptory challenges by the trial court error.

In sum, Ramos's Fourteenth Amendment procedural due process rights were violated. Accordingly, he is entitled to a new trial. We reverse the judgment of conviction and remand the matter to the trial court for a new trial.

By the Court.—Judgment reversed and cause remanded for a new trial.

Recommended for publication in the official reports.

WEDEMEYER, P.J. (*dissenting*). I write separately because the issue presented in this appeal ought to be decided by our supreme court in its supervisory policy-making role. The issue presented is one of first impression in this state. Although in the past we have not hesitated to decide issues of first impression, because the resolution of the issue presented is of such import and its disposition could cause such far reaching consequences to our jury trial system, I conclude it is far preferable for our supreme court to decide whether Ramos was denied due process when the trial court refused to dismiss one juror for cause. We are primarily an error correcting court and only secondarily, by necessity, a policy creating court, *see* ***Hillner v. Columbia County***, 164 Wis.2d 376, 396, 474 N.W.2d 913, 920 (Ct. App. 1991). Therefore, I would certify this case to our supreme court. Accordingly, I respectfully dissent.