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**DISTRICT IV**

September 11, 2019

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2018AP1720-CR

State of Wisconsin v. Torrey Eugene Anderson, Sr.  
(L.C. # 2016CF65)

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Torrey Anderson appeals a judgment of conviction and an order denying postconviction relief.<sup>1</sup> Anderson argues that his trial counsel was ineffective by failing to object to the State's use of its peremptory strikes against male prospective jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986) (the Equal Protection Clause prohibits prosecutors from striking a prospective juror

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<sup>1</sup> The Honorable David J. Rice presided over trial and entered the judgment of conviction. The Honorable Richard A. Radcliffe entered the order denying postconviction relief.

solely based on race), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (the Equal Protection Clause prohibits a party from challenging a potential juror solely on the basis of gender). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>2</sup> We summarily affirm.

Anderson was charged with multiple criminal counts as acts of domestic abuse. During jury selection, the State exercised its peremptory strikes against five male prospective jurors. Anderson was found guilty of all charges by the jury. After sentencing, Anderson filed a postconviction motion seeking a new trial. He argued that his trial counsel was ineffective by failing to object to the State's use of its peremptory strikes. The circuit court held an evidentiary hearing, at which defense counsel and the prosecutor testified. The court found that Anderson had made a prima facie case that the strikes were based solely on gender. The court then found that the prosecutor had stated a gender-neutral explanation for the strikes and that Anderson had not proved purposeful discrimination. The court therefore denied Anderson's postconviction motion.

Anderson contends that he is entitled to a new trial on grounds that his counsel was ineffective by failing to object at trial to the State's use of its peremptory strikes. A claim that trial counsel was ineffective by failing to challenge the State's use of peremptory strikes as discriminatory must show that such a challenge would have been successful. *See State v. Taylor*, 2004 WI App 81, ¶¶1, 16-17, 272 Wis. 2d 642, 679 N.W.2d 893. Thus, Anderson's claim of

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

ineffective assistance of counsel depends on his ability to show that a challenge to the State's use of its peremptory strikes would have resulted in the impaneling of a different jury.

A defendant's challenge to the State's use of its peremptory strikes must first establish a prima facie case that the prosecutor exercised the strikes with discriminatory intent. *See State v. Lamon*, 2003 WI 78, ¶¶27-28, 262 Wis. 2d 747, 664 N.W.2d 607. The burden then shifts to the prosecutor to state a neutral explanation for the strikes. *See id.*, ¶29. If the prosecutor offers a neutral explanation, the circuit court must determine whether the defendant has established purposeful discrimination. *See id.*, ¶32.

To repeat, the circuit court found that Anderson had established a prima facie case that the State's use of its peremptory strikes was based solely on gender. The circuit court then found that the State had offered a gender-neutral explanation for the strikes, and that Anderson had not established purposeful discrimination. Anderson argues, however, that the prosecutor failed to offer a gender-neutral reason for exercising peremptory strikes against three male prospective jurors, M.H., T.G., and R.C. Anderson contends that the prosecutor's stated reasons for striking those three prospective jurors were pretextual, and that the actual reason was to remove men from the jury panel. We turn, then, to the prosecutor's stated reasons for the strikes and the court's findings following the postconviction motion hearing. *Id.*, ¶45 ("Wisconsin law is in accord with the U.S. Supreme Court, holding that discriminatory intent is a question of historical fact, and the clearly erroneous standard of review applies at each step of the *Batson* analysis.").

The prosecutor filed an affidavit stating the following reasons for the peremptory strikes. The State struck prospective juror M.H. based on the prosecutor's knowledge that M.H. had prior interactions with the district attorney's office. The prosecutor acknowledged that M.H. had

stated that his interactions with the district attorney's office would not negatively affect his ability to fairly judge the facts of this case. However, the prosecutor was worried that the dismissal of a case in which M.H. had been the victim would negatively affect M.H.'s ability to fairly judge the facts of this case. The State struck prospective jurors T.G. and R.C. because the prosecutor believed the jurors failed to demonstrate that they were interested in participating in the jury process, including by failing to make any statements during jury selection. The prosecutor believed, based on his experience, that potential jurors who show a lack of interest in participation are more likely to render an unfair verdict.

Anderson argues that the prosecutor's stated reasons for striking M.H., T.G., and R.C. were pretexts rather than valid gender-neutral explanations. Anderson argues that the prosecutor's reason for striking M.H.—that the prosecutor was worried about M.H.'s ability to be fair given M.H.'s prior contacts with the district attorney's office—was insufficient because M.H. stated that he could be fair and impartial despite those experiences. Anderson argues that the prosecutor's reason for striking T.G. and R.C.—that they failed to demonstrate an interest in participating—was insufficient because the prospective jurors' failure to answer questions did not necessarily mean that they were uninterested in the process. Anderson argues that the prospective jurors' failure to respond just as likely resulted from the prospective jurors having no pertinent answers to the questions posed, and that the same reason would have supported striking prospective female jurors who did not make statements during jury selection. We conclude that the circuit court's finding that the State offered gender-neutral explanations for the strikes was not clearly erroneous.

A prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98. "The prosecutor's explanation must be clear, reasonably

specific, and related to the case at hand.” *Lamon*, 262 Wis. 2d 747, ¶29. However, the prosecutor’s stated reason “need not be persuasive, or even plausible.” *Id.*, ¶31 (quoted source omitted). The reason may be “silly,” “superstitious,” or a prosecutor’s “intuitive assumptions that are not fairly quantifiable.” *Id.*, ¶ 33 (quoted sources omitted). All that is required is that the prosecutor offer a “facially nondiscriminatory” reason for the strike. *Id.*, ¶31. Thus, “[u]nless discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed ... neutral.” *Id.*, ¶30 (quoted source omitted).

Here, the prosecutor offered facially nondiscriminatory reasons for the strikes, as stated above. Those reasons are not inherently discriminatory, and therefore they meet the second step of the *Batson* test.

Anderson also argues, however, that he met his burden to show purposeful discrimination. He argues that the prosecutor’s purposeful gender discrimination was clear and evident. He contends that the prosecutor offered fantastical reasons for exercising its strikes, and that the prosecutor’s real reason was to exclude men from the jury. He contends that the prosecutor’s stated reasons were not plausible under the facts of this case, and thus did not overcome his prima facie case of purposeful discrimination. We conclude that the circuit court’s finding that Anderson did not establish discriminatory intent was not clearly erroneous.

“[W]hen the prosecutor offers a ... neutral explanation [for the strikes], the circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established.” *Id.*, ¶32. The defendant has the burden to establish that the prosecutor’s stated reasons for the strikes were a pretext for purposeful discrimination. *Id.* “[I]t is at this step that the issue of persuasiveness and plausibility of the prosecutor’s reasons for

the strike become relevant, and implausible or fantastic justifications may be found to be pretexts for purposeful discrimination.” *Id.* (quoted source omitted). Ultimately, however, the “decisive question” at this step is whether the prosecutor’s stated reasons for the strikes “should be believed.” *Id.*, ¶43 (quoted source omitted). Because the circuit court “is in the best position to determine the credibility of the [S]tate’s ... neutral explanations,” we give “great deference” to the court’s ruling as to whether the prosecutor had racially discriminatory intent or purpose in exercising the strikes. *Id.*, ¶¶41-42.

Here, the circuit court found that the prosecutor did not exercise the State’s peremptory strikes on the basis of gender. We accept the court’s determination as to the credibility of the State’s gender-neutral explanations.

In sum, a *Batson* challenge to the State’s exercise of its peremptory strikes would have lacked merit. Accordingly, Anderson’s defense counsel was not ineffective by failing to raise such a challenge during jury selection.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*