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

2018AP2374 State of Wisconsin v. Justin T. Winston (L.C. # 2010CF3469)

Before Brash, P.J., Dugan and Donald, 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).

Justin T. Winston, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2017-18) motion for postconviction relief.[1] Based upon our review of the briefs and record, we

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm the order.[2]

A jury found Winston guilty of one count of first-degree intentional homicide as a party to a crime and one count of being a felon in possession of a firearm, contrary to WIS. STAT. §§ 940.01(1)(a), 939.05, and 941.29(2) (2009-10).[3] After sentencing, Winston filed two postconviction motions that were denied. Winston appealed.

Winston's appeal concerned an alleged ***Batson*** violation during jury selection. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). Specifically, Winston argued that "the trial court erred when it decided that there was no ***Batson*** violation at the jury trial and when it denied [the] postconviction motion on this issue." *See* ***State v. Winston,*** ("***Winston I***"), No. 2015AP1419-CR, unpublished slip op. ¶1 (WI App Oct. 10, 2017) (bracketing in original; quoting Winston's appellate brief). Winston further argued that if this court were to conclude that his argument was forfeited because the ***Batson*** issue was raised by the State rather than trial counsel, then this court should conclude that trial counsel provided ineffective assistance.[4] *See* ***Winston I***, No. 2015AP1419-CR, ¶1.

[2] Winston's fifty-page brief contains some arguments that do not merit discussion because they are inadequately briefed or because we have resolved the appeal on other bases. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that court will not consider inadequately developed arguments); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (holding that "cases should be decided on the narrowest possible ground").

[3] The jury acquitted Winston of a second charge of first-degree intentional homicide.

[4] Immediately after the jury was selected, the State indicated that it was bringing the ***Batson*** issue to the trial court's attention because it observed that no African-Americans were selected for the jury after the parties exercised their peremptory strikes. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). The State struck one African-American and the defense struck three African-Americans.

We rejected Winston's arguments and affirmed his convictions. *See* ***id.***, ¶19. First, we concluded "that Winston did not properly raise or preserve a ***Batson*** challenge during the trial." *See* ***Winston I***, No. 2015AP1419-CR, ¶13. Second, we rejected Winston's ineffective assistance argument, concluding "that Winston's postconviction motion did not demonstrate that he was prejudiced by his trial counsel's alleged deficiency." *See* ***id.***, ¶17. We explained:

> The first step in a ***Batson*** claim requires a defendant to show two things: (1) that he "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) that "the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." Winston's postconviction motion and his opening appellate brief alleged that a prima facie case was established because Winston is African-American and "the State used a peremptory strike to remove … a member of Winston's race from the jury." While those facts satisfy one of the two requirements for the first step in a ***Batson*** claim, Winston's postconviction motion and opening appellate brief did not specifically address the second requirement: particular facts or circumstances that raise an inference that the State used a peremptory strike to exclude Juror 27 because of his race.

Id. (citations and italics omitted). After we affirmed, Winston filed a petition for review, which the Wisconsin Supreme Court denied on January 8, 2018.

On October 3, 2018, Winston filed the *pro se* WIS. STAT. § 974.06 motion that is at issue in this appeal. First, Winston again challenged the trial court's ruling on the ***Batson*** issue, and he argued that both trial counsel and postconviction counsel provided ineffective assistance with respect to that issue.[5] Second, Winston raised a new issue when he asserted that, during closing arguments, the State "improperly vouched" for a witness's out-of-court statement and "argued

[5] In addition to arguing that the State engaged in racial discrimination, Winston for the first time asserted that the State also engaged in gender discrimination when it struck Juror 27.

facts not in evidence." (Bolding omitted.) Winston argued that both trial counsel and postconviction counsel provided ineffective assistance by failing to address the State's improper closing argument.

The trial court denied Winston's WIS. STAT. § 974.06 motion in a written decision, without ordering a response from the State and without holding a hearing. This appeal follows.

We begin with the applicable legal standards. A defendant who files a postconviction motion is not automatically entitled to a hearing. If the motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review a trial court's discretionary decision to grant or deny a hearing under the erroneous exercise of discretion standard. *See* ***id.*** Whether a WIS. STAT. § 974.06 motion alleges sufficient facts to require a hearing is a question of law an appellate court reviews *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

Applying those legal standards, we conclude that Winston was not entitled to a hearing or relief. We begin our analysis with the ***Batson*** issue. As noted, we concluded in Winston's direct appeal that he "did not properly raise or preserve a ***Batson*** challenge during the trial." *See* ***Winston***, No. 2015AP1419-CR, ¶13. Winston cannot relitigate that conclusion. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

In Winston's direct appeal, we also rejected his argument that his forfeiture of a ***Batson*** claim was due to the ineffective assistance of trial counsel. Specifically, we concluded that the postconviction motion had not adequately alleged facts supporting a prima facie case—the first step in a ***Batson*** analysis—because the motion did not include "particular facts or circumstances that raise an inference that the State used a peremptory strike to exclude Juror 27 because of his race." *See* ***Winston I***, No. 2015AP1419-CR, ¶17. Therefore, we concluded, "Winston's postconviction motion did not demonstrate that he was prejudiced by trial counsel's failure to preserve and pursue a ***Batson*** claim." *See* ***Winston I***, No. 2015AP1419-CR, ¶19.

In his latest postconviction motion, Winston challenged this court's conclusion that he had to demonstrate a prima facie case of discrimination in order to prove that his trial counsel provided ineffective assistance. Winston cited case law suggesting that courts need not consider whether a prima facie case was established if the trial court moved to the second and third steps of the ***Batson*** analysis. *See, e.g.*, ***State v. King***, 215 Wis. 2d 295, 298, 572 N.W.2d 530 (Ct. App. 1997). We decline to address whether that principle would apply here—where it has been determined that the defendant did not properly raise or pursue a ***Batson*** claim—because Winston cannot relitigate the legal analysis this court employed in his direct appeal. *See* ***Witkowski***, 163 Wis. 2d at 990.

Recognizing that a court might reject his argument that he did not need to establish a prima facie case of discrimination, Winston's postconviction motion argued in the alternative

that several facts established a prima facie case of racial and gender discrimination.[6] First, no jurors raised their hands when the trial court asked whether any juror was "aware of any bias or prejudice they may have in this matter[.]" Thus, Winston concluded, Juror 27 did not show bias toward either party. Second, Juror 27 stated that he was not married, had two adult children, was a personal trainer, had not previously served on a jury, and liked roller skating. Winston argued: "These are not reasons for [Juror 27] to be struck." Finally, Winston noted that the State did not ask Juror 27 any follow-up questions about his job before striking him.

On appeal, the State argues, "None of those facts, had postconviction counsel advanced them, would have established a prima facie case of discriminatory intent or purpose under ***Batson***." (Bolding added.) The State asserts that the fact "that no jurors self-identified as showing bias or prejudice and that Juror 27 provided neutral information about his status, employment, and hobbies does not raise an inference the State used the peremptory strike with discriminatory intent." The State argues that "to establish an inference of discriminatory intent, Winston had to identify relevant circumstances that included 'any pattern of strikes against jurors of the defendant's race and the prosecutor's voir dire questions and statements.'" *See* ***State v. Lamon***, 2003 WI 78, ¶28, 262 Wis. 2d 747, 664 N.W.2d 607. The State contends that Winston failed "to identify patterns, questions, or statements by the prosecutor during voir dire supporting an inference of discriminatory intent."

[6] Some of the facts that Winston identified are statements the State made when the trial court proceeded to steps two and three of the ***Batson*** analysis. Winston has not adequately explained why it would be appropriate to consider those statements when deciding whether a prima facie case was established in the first step of the ***Batson*** analysis. Therefore, we do not discuss those statements.

We agree with the State that the prosecutor's questions and statements did not support an inference of discriminatory intent. The fact that the State brought the lack of African-American jurors to the trial court's attention—thereby inviting scrutiny of the State's use of its peremptory challenge—further suggests there was no discriminatory intent. We conclude, as we did in Winston's direct appeal, that he has not presented facts supporting a prima facie case of discriminatory intent. Therefore, he cannot demonstrate that he was prejudiced by trial counsel's failure to raise or preserve a ***Batson*** challenge or postconviction counsel's alleged failure to adequately present those facts as part of Winston's direct appeal.

We now turn to the new claim that Winston raised in his WIS. STAT. § 974.06 motion. Where, as here, a defendant seeks relief under § 974.06 following a prior postconviction motion and appeal, the motion must establish a "sufficient reason" for failing to previously raise any issues that could have been raised in the earlier proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). A claim of ineffective assistance of postconviction counsel may present a "sufficient reason" to overcome the procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To establish that postconviction counsel was ineffective, the motion must show that the claims now asserted are clearly stronger than the issues that postconviction counsel chose to pursue. ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

For reasons explained below, we conclude that the new issue that Winston raised in his latest postconviction motion does not have merit. Therefore, it was not clearly stronger than the issues postconviction counsel raised, and as such Winston is not entitled to relief. *See* ***id.***

Winston's postconviction motion alleged that during closing arguments, the prosecutor "improperly vouched" for one witness's statement and "argued facts not in evidence." (Bolding omitted.) Winston asserted that trial counsel provided ineffective assistance by failing to object to the prosecutor's statements on four occasions.[7] We reject Winston's arguments because we conclude that the prosecutor's statements were not improper.

"A prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." ***State v. Lammers***, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463. However, "[a]rgument on matters not in evidence is improper." ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854 (citation omitted). With those standards in mind, we turn to the four statements by the prosecutor that Winston identified in his postconviction motion.

First, Winston argued that the prosecutor improperly vouched for the testimony of Winston's cousin, Ricky Grinston, who was interviewed by a detective shortly after the shooting concerning statements Winston made to Grinston. The prosecutor stated: "There was no more profound and truthful testimony in this trial other than by Mr. Grinston on that videotape." That was not an improper argument; the prosecutor is permitted to argue that the witness's testimony was compelling. *See* ***Lammers***, 321 Wis. 2d 376, ¶16. Further, the prosecutor did not rely on facts outside the record to support his argument. *See* ***Smith***, 268 Wis. 2d 138, ¶23.

[7] Winston's motion did not acknowledge that trial counsel disputed some of those statements when he gave his closing argument.

Next, Winston argued that the prosecutor mischaracterized part of Grinston's recorded statement when he told the jury: "Grinston says, my God, my God, I'm a snitch. I have to move my family. I'm gonna be killed by these guys."[8] Having listened to Grinston's recorded statement, we conclude that the prosecutor's statement was not improper because it was based on the evidence presented at trial. While Grinston did not use those exact words when he spoke to the detective, he referred to himself as "a snitch" and expressed concern about his safety, stating, "I don't even know if I want to go home or go out to the streets[;] they're gonna be looking for me, now I got to worry about me … [and] worry about moving my girl[.]" He also said, "I should have let this go, and … I got to move my family, my girl is scared, she think[s] people gonna retaliate[.]" The recorded statements, which the jury heard, support the prosecutor's argument that Grinston was concerned that he would be harmed by people who were angry that he spoke to the detective.

Winston's third concern with the prosecutor's closing argument related to fingerprints from Winston found on the outside of the driver's door of the vehicle used in the crime. The prosecutor argued that Winston left the fingerprints as he was running away from the vehicle. In his postconviction motion, Winston argued that the testimony of two witnesses did not support the prosecutor's argument. We disagree. The testimony of the fingerprint identification technician, which the prosecutor explicitly referenced, provided a basis to argue that Winston's fingerprints were fresh. The prosecutor's argument was based on witness testimony and was not improper. *See* ***id.***

[8] The jurors were given a transcript of Grinston's recorded statement to assist them as they listened to the recording, and they were instructed that only the recording was evidence. The quoted language in this decision is taken from the transcript of the call and is consistent with the recording.

The fourth concern with the prosecutor's closing argument that Winston identified in his postconviction motion related to testimony from a DNA analyst who said that Winston was a possible contributor to a mixture of DNA recovered from a gun. The analyst testified that "approximately one out of 3,000 individuals could be a contributor to this mixture" and that "Winston is included within the population who could have contributed to this mixture profile." When the prosecutor asserted that "Winston's DNA was on that gun," he also acknowledged that the defense could argue that the DNA tests were not conclusive, based on the analyst's testimony about "one in 3,000." When viewed in their entirety, the prosecutor's comments about the DNA evidence on the gun do not suggest the prosecutor was arguing facts outside the record. *See* ***id.***

In summary, we conclude that the prosecutor's statements were not improper. Therefore, Winston cannot demonstrate that trial counsel was ineffective for not objecting to the prosecutor's closing argument. We conclude that this issue was not clearly stronger than the issues postconviction counsel pursued on direct appeal and that Winston was not entitled to an evidentiary hearing or relief based on his new claim or the previously litigated ***Batson*** claim. Therefore, we summarily affirm the order denying Winston's WIS. STAT. § 974.06 postconviction motion.

IT IS ORDERED that the circuit court's order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals