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DISTRICT IV

July 8, 2022

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

2020AP1576-CRNM State of Wisconsin v. Keenan F. Brown (L.C. # 2018CF116)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Attorney Michael Rosenberg, appointed counsel for Keenan Brown, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Brown was sent a copy of the report and filed a response. Counsel then filed a supplemental no-merit report and, at this court's request, a second supplemental no-merit report. Brown filed two additional responses. Upon consideration of the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

no-merit report, the supplemental reports, Brown's responses, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal and that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Brown was charged with substantial battery and robbery by use of force, both as party to a crime. The charges arose from an incident in which two African-American men, Brown and another individual, were alleged to have attacked and robbed another man in a highway rest area bathroom. The case proceeded to a jury trial.

The victim testified that he was using a bathroom stall when he saw hands coming over each side of the stall. He described the hands that he saw as darker-colored or brown, appearing to him to be an "Afro-American-type" skin color. The victim recalled being hit with hard force but could remember little else about the incident. He was rendered unconscious, and when he regained consciousness, he realized that several of his teeth had been knocked out and that his wallet and phone were missing.

The victim was treated at a hospital where law enforcement collected his clothing as evidence. His wallet was found in a field, by someone walking a dog, about four miles away from the rest area where the incident occurred. The wallet was turned over to law enforcement.

Both the victim's clothing and his wallet were tested for DNA. The DNA analyst who performed the testing testified that Brown was a possible contributor to a DNA mixture on the victim's pants and that the probability of a randomly selected unrelated individual being a contributor was 1 in 110,000. The analyst also testified that Brown was a possible contributor to

a DNA mixture on the victim's wallet and that the probability of a randomly selected unrelated individual being a contributor was 1 in 843,000.

The jury found Brown guilty. The circuit court sentenced Brown to a thirteen-year bifurcated term of imprisonment on the robbery by use of force charge and a concurrent two-year bifurcated term of imprisonment on the substantial battery charge.

The first potential issue we address is sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. We will not overturn a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The evidence here was sufficient to convict Brown. Although neither the victim nor any other witness could identify the victim's assailants, the DNA evidence against Brown was sufficient under the circumstances to support a finding that Brown was one of the assailants. There was no evidence to suggest any alternative explanation for the presence of Brown's DNA on the victim's pants and wallet.

In his responses, Brown does not challenge the sufficiency of the evidence. He does, however, raise a number of other issues relating to trial. Counsel maintains that none of these issues has arguable merit. We agree, and we now discuss each of the issues.

Brown first contends that trial counsel was ineffective by failing to challenge one of the prosecutor's peremptory strikes pursuant to ***Batson v. Kentucky***, 476 U.S. 79 (1986). We conclude that there is no arguable merit to this issue because, in short, the record demonstrates

that there were race-neutral reasons that the prosecutor could have offered for the peremptory strike. In the paragraphs that follow, we explain our reasoning in more detail.

In ***Batson***, the United States Supreme Court held that the Equal Protection Clause forbids the prosecution from challenging "potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State's case against a [B]lack defendant." ***Batson***, 476 U.S. at 89. A ***Batson*** challenge involves a three-step process. ***State v. Lamon***, 2003 WI 78, ¶27, 262 Wis. 2d 747, 664 N.W.2d 607.

The first step requires the defendant to make a prima facie showing of discriminatory intent by establishing (1) that the defendant is a member of a cognizable group and that the prosecution has exercised peremptory strikes to remove members of the defendant's race from the jury pool, and (2) that the "facts and relevant circumstances" raise an inference that the prosecution used its peremptory strikes to exclude potential jurors because of their race. ***Id.***, ¶28.

In the second step under ***Batson***, if the defendant establishes a prima facie case, the burden shifts to the prosecution to come forward with a race-neutral explanation for challenging the dismissed juror or jurors. ***Lamon***, 262 Wis. 2d 747, ¶29. "Facial validity of the prosecutor's explanation is the issue," and "[u]nless discriminatory intent is inherent in the prosecutor's explanation, 'the reason offered will be deemed race neutral.'" ***Id.***, ¶30 (quoted source omitted). The explanation need not rise to the level of a strike for cause. ***Id.***, ¶31.

In the third and final step under ***Batson***, the circuit court weighs the credibility of the prosecution's explanation and decides whether the prosecution has engaged in purposeful discrimination. ***Lamon***, 262 Wis. 2d 747, ¶32. The defendant bears the ultimate burden to

establish that the prosecution purposefully discriminated or that the prosecution's explanation was a pretext. ***Id.***

Brown alleges that the prosecutor in his case used a peremptory strike to eliminate the only potential juror who was multiracial. Brown further alleges that this potential juror's race was African-American and white. We infer that Brown also means to allege that this potential juror was the only potential juror who was non-white or appeared to be non-white. Finally, Brown alleges that trial counsel could have made a prima facie showing under ***Batson***.

We will assume, as Brown alleges, that the prosecution used a peremptory strike to eliminate the only non-white potential juror. We will further assume, as Brown alleges, that trial counsel could have made a prima facie showing under ***Batson*** on this basis.[2]

Brown appears to contend that this should be enough to pursue a claim that trial counsel was ineffective because if trial counsel had raised the ***Batson*** challenge, then (1) the burden would have shifted to the prosecution to offer a race-neutral explanation, (2) Brown would have been entitled to a circuit court determination on the credibility of the prosecutor's explanation, and (3) this court would have been bound to review that determination as a question of fact.

That is an accurate description of the procedure that would have occurred had trial counsel raised the ***Batson*** challenge and made a prima facie showing. However, this case is now in a different procedural posture in which Brown has the burden to show that counsel was ineffective with respect to the unraised ***Batson*** challenge. To show ineffective assistance of

[2] These assumptions, along with information in the record that we discuss in the text, makes it unnecessary for us to address Brown's contention that appellate counsel should have conducted an investigation to determine the race and ethnicity of each member of the jury pool.

counsel, a defendant must establish both (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, we conclude that regardless of whether Brown could make a non-frivolous argument that counsel performed deficiently by failing to raise the ***Batson*** challenge, Brown cannot make a non-frivolous argument that counsel's failure to raise the ***Batson*** challenge resulted in prejudice.

To show prejudice based on counsel's failure to raise a ***Batson*** challenge, the defendant must show a reasonable probability that the ***Batson*** challenge would have succeeded. *See* ***State v. Taylor***, 2004 WI App 81, ¶17, 272 Wis. 2d 642, 679 N.W.2d 893 ("[I]n order to show prejudice," the defendant "must establish that had trial counsel made the ***Batson*** objection, there is a 'reasonable probability' that it would have been sustained and the trial court would have taken the appropriate curative action.").

Here, the record of the jury selection proceedings persuades us that Brown could not make the required showing of prejudice. First and foremost, the record shows that there were logical race-neutral reasons for the prosecutor to exercise peremptory strikes against the only two potential jurors who could have been the non-white potential juror.[3] The first of these two potential jurors, #12, stated that he had served as the foreperson in two previous civil jury trials and that in one of those trials the jury's verdict disfavored a police officer. The second of these two potential jurors, #9, admitted that he was charged with a crime because of his involvement in

[3] Brown has not identified the non-white potential juror, but he states in his allegations that this potential juror was a man, and the record shows that the prosecutor exercised peremptory strikes against two men and three women.

a confrontation. Additionally, the prosecutor did not leave on the jury any other similarly situated potential jurors. Finally, there was no pattern of strikes against multiple non-white potential jurors that would have been likely to arouse suspicion that the prosecutor had a discriminatory purpose. Under these circumstances, Brown cannot argue that there is a reasonable probability that the ***Batson*** challenge would have succeeded.

Brown next contends that trial counsel was ineffective by failing to ensure that there was a sufficient record of the jury selection proceedings and that the lack of a sufficient record deprives him of a meaningful appeal. We conclude that there is no arguable merit to these issues. Although the parties exercised their peremptory strikes off the record, the jury selection proceedings were recorded and transcribed. The record includes a printed list of the potential jurors that shows their full names, cities, and zip codes, along with each party's peremptory strikes.

Brown next argues that the prosecutor engaged in prosecutorial misconduct by vouching for the State's witnesses during closing arguments and that trial counsel was ineffective by failing to object to this alleged vouching. We conclude that there is no arguable merit to these issues. Brown relies on ***United States v. Wolfe***, 701 F.3d 1206 (7th Cir. 2012), in which the court stated the relevant legal standards for impermissible vouching as follows:

> We have recognized two types of impermissible vouching: "a prosecutor may not express her personal belief in the truthfulness of a witness, and a prosecutor may not imply that facts not before the jury lend a witness credibility." ***United States v. Alviar***, 573 F.3d 526, 542 (7th Cir. 2009). A prosecutor may, however, comment on a witness' credibility as long as "the comment reflects reasonable inferences from the evidence adduced at trial rather than personal opinion." [***United States v. Nunez***, 532 F.3d 645,] 654 (quotations omitted).

Id. at 1212. Under these standards or the similar standards stated in Wisconsin case law, Brown has no reasonable basis to argue that the prosecutor here engaged in impermissible vouching.[4]

Brown next argues the prosecutor engaged in misconduct by making "subtle references" to the fact that Brown did not testify and that trial counsel was ineffective by failing to timely object to these references. We conclude that there is no arguable merit to these issues. "[F]or a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present." ***State v. Jaimes***, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669. First, "the comment must constitute a reference to the defendant's failure to testify." ***Id.*** Second, "the comment must propose that the failure to testify demonstrates guilt." ***Id.*** Third, "the comment must not be a fair response to a defense argument." ***Id.*** Here, we agree with appellate counsel that the prosecutor made no statements that come close to satisfying this three-factor test.[5]

[4] An example of the prosecutor's arguments that Brown contends were impermissible vouching is an argument that the DNA analyst was unlikely to be mistaken given the DNA testing procedures that are in place to prevent mistakes. This argument was not an expression of the prosecutor's personal belief in the analyst's truthfulness and was instead a reasonable comment on the evidence.

[5] Brown asserts that his appeal should be stayed pending a decision in ***State v. Hoyle***, No. 2020AP1876-CR, unpublished slip op. (WI App April 26, 2022), in which a petition for review is pending in the Wisconsin Supreme Court. Counsel similarly raises the possibility of a stay pending ***Hoyle*** but does not expressly advocate for or against a stay. For the following reasons, we conclude that Brown's appeal should not be stayed pending ***Hoyle***.

Hoyle was a sexual assault case in which the victim testified and the defendant exercised his right not to testify. *See* ***Hoyle***, No. 2020AP1876-CR, ¶¶1, 3-5, 8. There was no DNA evidence or any other evidence to corroborate the victim's account of the assault; rather, the State's case "depended almost entirely upon [the victim's] credibility." *See* ***id.***, ¶4. This court in ***Hoyle*** concluded that, under the circumstances of that case, the prosecutor violated the defendant's right not to testify by (1) repeatedly arguing to the jury that the evidence was "uncontroverted," (2) telling the jury that the jury had "heard no evidence" to the contrary, and (3) asserting to the jury that there was "absolutely no evidence" stating otherwise. ***Id.***, ¶17. We see nothing about ***Hoyle*** that Brown could use to make a non-frivolous argument (continued)

The prosecutor in Brown's case did make one statement during rebuttal arguments that could be understood to imply, incorrectly, that the burden of proof was on Brown. We now discuss that statement.

After summarizing the DNA evidence against Brown, the prosecutor said: "I want to close with this, what is the reasonable hypothesis consistent with his innocence. One wasn't offered." Brown's counsel objected to this statement as misstating the burden of proof, and counsel also moved for a mistrial or, in the alternative, a curative jury instruction. The circuit court sustained counsel's objection, declined to grant a mistrial, and immediately reinstructed the jury on the State's burden of proof.

Brown contends that the circuit court erred by denying his motion for a mistrial. We conclude that there is no arguable merit to this issue. "The decision whether to grant a mistrial lies within the sound discretion of the [circuit] court." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894 (2003). "[N]ot all errors warrant a mistrial and 'the law prefers less drastic alternatives, if available and practical.'" ***State v. Givens***, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (quoted source omitted). Under the circumstances here, Brown could not reasonably claim that the court misused its discretion by using the less drastic alternative of an immediate curative instruction. As appellate counsel notes, the court's approach had the advantage to Brown of reminding the jury of the State's burden of proof in the middle of the prosecution's rebuttal.

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here. The prosecutor in Brown's case did not make arguments that are similar to the prosecutor's arguments in ***Hoyle***, and the facts of Brown's case are not otherwise similar to the facts in ***Hoyle***.

The next issue that Brown raises is whether the State violated its obligations under ***Giglio v. United States***, 405 U.S. 150 (1972), by failing to disclose information about an administrative employee in the sheriff's department. Brown's explanation of this issue is difficult to follow. However, we agree with appellate counsel that the undisclosed information appears to be the employee's performance improvement plan, and it further appears that Brown is alleging that the employee was involved in handling evidence in his case. We agree with counsel that there is no arguable merit to this issue. In ***Giglio***, the Court reversed a conviction because the prosecution failed to disclose that it had offered immunity to a key witness in exchange for the witness's testimony. *See* ***id.*** at 150-51, 154-55. Here, the sheriff's employee did not testify, and there was no evidence suggesting that the employee was involved in handling evidence in Brown's case.[6]

The last issue that Brown raises in his responses is whether trial counsel was ineffective by failing to call a DNA expert to testify regarding the "scientific possibility of DNA transfer." Brown asserts that a defense DNA expert could have provided an alternative explanation for how Brown's DNA might have ended up on the victim's pants and wallet.

In the supplemental no-merit report, appellate counsel provides the following explanation regarding his review of this ineffectiveness of counsel issue and his conclusion that it lacks arguable merit:

> In undersigned counsel's review of the trial counsel's file, as alluded to by Mr. Brown, counsel learned that trial counsel

[6] Prior to trial, the parties discussed the possibility that the employee may have been involved in handling evidence in Brown's case, along with the possibility that she might testify and that the defense might cross-examine her with her performance improvement plan. However, as noted above, the employee did not testify, and there was no evidence suggesting that she was involved in handling evidence in Brown's case.

> retained a defense DNA expert and sent all of the materials to them. However, there was no report in the file from the expert which indicated to counsel from 30+ years of civil and criminal defense practice that the expert's findings were harmful to Mr. Brown's defense. Thus, counsel contacted trial counsel and confirmed that the defense expert could not offer any favorable opinions on behalf of Mr. Brown's defense—their testimony would be harmful to his defense. Thus, it was not ineffective for trial counsel not to call the expert. Instead, it would have been highly ineffective to call the expert at trial.
>
> In addition, undersigned counsel after being appointed, sent all of the DNA related reports and testimony to the State Public Defender's Forensic Team to get a second opinion on whether counsel should retain another defense expert. That team also did not see anything in the reports that was wrong or invalid. Thus, in undersigned counsel's opinion, there was no reason to retain yet another defense DNA expert.
>
> Based on the above, counsel concluded that trial counsel was not ineffective for failing to call a DNA expert at trial and that there would be no merit in raising the issue on a post-conviction motion. Nor from a review of the record and counsel's investigation was there an alternative explanation for Mr. Brown's DNA being present that counsel could present. Furthermore, after counsel's investigation, there was no way for counsel to argue that the failure to call a defense DNA expert was prejudicial.

Based on appellate counsel's explanation and our independent review of the record, we are satisfied that counsel has properly analyzed this issue as having no arguable merit. We agree with counsel that the record contains no evidence suggesting any plausible innocent explanation for how Brown's DNA might have been transferred to the victim's pants and wallet. This is particularly so given that the evidence established that these two items were separated at the time of the incident and recovered in different locations. Brown does not now allege any plausible innocent explanation for how his DNA might have been transferred to the victim's pants and wallet, nor does he allege any plausible reason to believe that a defense DNA expert could have offered an innocent explanation for the transfer.

Based on our review of the record, we see no other issue of arguable merit with respect to events before or during trial, including with respect to pretrial motions, evidentiary rulings, the knowing and voluntary nature of Brown's decision not to testify, and other matters. We turn to sentencing.

Counsel contends that there is no non-frivolous basis for Brown to challenge his sentence. We agree. The circuit court considered the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not consider any improper factors. Brown's sentence was within the maximum allowed and could not be challenged as unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other arguable basis upon which Brown might challenge his sentence.

Our independent review of the record discloses no other potential issues for appeal, and we see nothing further in Brown's responses that raises any other non-frivolous issues.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael Rosenberg is relieved of any further representation of Keenan Brown in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals