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DISTRICT II

March 27, 2024

To:

Hon. Jason A. Rossell
Circuit Court Judge
Electronic Notice

Hon. Mary Kay Wagner
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1918-CR

State of Wisconsin v. Bernard J. Bush, Jr. (L.C. #2016CF689)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Bernard J. Bush, Jr. appeals a judgment of conviction, entered following a jury trial, for first-degree recklessly endangering safety with use of a dangerous weapon as a repeater and felon in possession of a firearm. He also appeals an order denying postconviction relief. On appeal, Bush argues the circuit court erred by allowing the prosecutor to use a peremptory strike to remove the only black person from the panel. He also argues that the circuit court erred by denying him a postconviction-evidentiary hearing on his challenge. 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 (2021-22).¹ We affirm.

At trial, the prosecutor used one of her peremptory strikes to remove the only black person from the panel. Bush, who is black, challenged the prosecutor's use of the peremptory strike. The circuit court held a hearing on Bush's challenge. The prosecutor explained that, before trial, her office always runs the jury panel through the district attorney's database to look for prior contacts with the district attorney's office. According to that database, the juror in question had an unlawful-use-of-a-telephone case from 2000. The prosecutor explained that, during voir dire, when she asked "if there was any prior contacts with our office, he did not indicate yes." The prosecutor also explained her other preemptory strikes, noting:

First is this man who had multiple cases with us in '07, '08. We struck him. This woman was a victim in a case that she did not mention to us. We struck her. This was also a mother of a sexual assault victim that she didn't feel the need to tell us about. We struck her. And then I – So I have circled the other one or – although they ended up striking him.^[2]

Bush's trial counsel objected. Counsel argued that the 2000 case was "so old" and suggested that the juror did not even remember it. The circuit court responded: "Well, my understanding of the law that exists [in] *Batson*^[3] is that they don't have to have a good reason. They have to have a reason, and, apparently, they have applied their reason."

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² Bush's appellate counsel explains that this juror was struck by Bush's trial counsel.

³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

The court then inquired whether the prosecutor was certain she had the right person based on date of birth. The prosecutor stated that she did not have the date of birth of the juror and was only able to match names, but offered that the individual with the unlawful-use-of-a-telephone case was born in December 1968. The circuit court had its clerk look up the date of birth of the juror and was informed that the juror was born on December 12, 1968. The court stated, “It’s the same person, okay. Okay. We’re done.”

The trial proceeded, and the jury found Bush guilty of both charged offenses.

Bush then brought a postconviction motion asking for “a hearing on his *Batson* challenge.” He attached exhibits that included an investigator’s report of her conversations with the juror and as well as another potential juror that the prosecutor had struck from Bush’s jury. Both confirmed that they had contacts with the district attorney’s office and that they had not disclosed these contacts at voir dire because they did not think they were serious enough.

In a written order, the circuit court denied the motion, noting that the motion concerned “a *Batson* challenge raised immediately during jury selection,” and that “a sufficient record [was] made of the issue for meaningful appellate review.”

On appeal, the parties agree that to make a successful challenge to the composition of a jury, Bush must first make a prima facie showing that the prosecutor exercised the strike on the basis of race; that if he does so, the burden shifts to the State to articulate a race-neutral explanation; and that the circuit court then determines whether the defendant carried his burden of proving purposeful discrimination. See *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991). We review each of these determinations using the “clearly erroneous” standard. *State v. Lamon*, 2003 WI 78, ¶45, 262 Wis. 2d 747, 664 N.W.2d 607.

Bush argues the circuit court failed to exercise its discretion when considering whether Bush proved purposeful discrimination. We disagree. The prosecutor explained that she struck the juror for failing to disclose contacts with her office when asked to do so during voir dire. *See id.*, ¶87 (“Failure to disclose during voir dire any police contacts at his residence is a plainly race-neutral justification for striking him.”). The prosecutor also struck other individuals who did not disclose contacts with her office. The prosecutor provided the circuit court with evidence of the juror in question’s prior contacts. The circuit court then took steps to verify that the proffered reason was not pretextual when it had the clerk independently verify the juror’s birthdate to compare to the individual with the unlawful-use-of-a-telephone case. *See id.*, ¶42 (“[T]he trial court judge is in the best position to determine the credibility of the state’s race-neutral explanations.”). The circuit court’s finding that Bush did not prove purposeful discrimination is not clearly erroneous. *See id.*, ¶¶42-43.

Bush, however, argues the circuit court “simply defer[ed] to the prosecutor’s claim that she struck [the juror] because he was not truthful in answering her questions.” He contends the circuit court should have questioned the juror to determine why he did not disclose prior contact, inquiring into the age of the case, circumstances of the contact, how the case was resolved, and whether the juror felt comfortable disclosing the information. Bush asserts that the circuit court should have examined whether the prosecutor’s strategy of using the district attorney’s computer records, which contain different information than online circuit court records, to “obtain information about jurors and then not engaging in any further voir dire of the jurors [was] a pretext for eliminating members of a minority group from a jury when they do not disclose information only known to the prosecution.” Bush argues the court failed to consider that “because African Americans are more likely to have contact with the police, the likelihood that

the method used in the case at bar will result in a peremptory being used against a minority is greater.”

We reject Bush’s arguments. As stated above, the prosecutor struck the juror because, when asked, the juror did not disclose his prior contacts with her office. “[T]he trial court judge is in the best position to determine the credibility of the state’s race-neutral explanations.” *Lamon*, 262 Wis. 2d 747, ¶42. The circuit court accepted the prosecutor’s proffered race-neutral explanation without making “detailed findings,” as it is permitted to do. See *id.*, ¶77. There is no requirement that the circuit court engage in further questioning with the prosecutor or the potential juror. Moreover, the court did not simply defer to the prosecutor as Bush suggests. Instead, the circuit court independently corroborated the information that the prosecutor relied on to confirm by birthdate that the prosecutor’s information related to the juror.

Bush next argues the circuit court erred by denying his request for a postconviction evidentiary hearing on his *Batson* challenge. We disagree and conclude the circuit court properly denied his request. See *State v. Gregory*, 2001 WI App 107, ¶14, 244 Wis. 2d 65, 630 N.W.2d 711 (The “postconviction evidentiary hearing was properly denied because a circuit court’s decision on a *Batson* challenge must be made before the jury is sworn.”).

Furthermore, in a *Batson* challenge, “when attempting to prove the reasons given by the prosecutor were pretextual, the focus must be on what the prosecutor knew about the potential juror when he made the strike.” *Gregory*, 244 Wis. 2d 65, ¶14. “[A] defendant must show either that the prosecutor intentionally misrepresented the facts he said he relied on or that he had been told those facts but he knew they were erroneous.” *Id.* In Bush’s postconviction motion, Bush sought to introduce the beliefs and state of mind of the potential jurors who did not disclose

requested information during voir dire and were struck. This evidence is not relevant to the prosecutor's intent. *See id.* The circuit court did not err by denying Bush a postconviction evidentiary hearing. *See id.*

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.
See WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals