

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP967-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF898

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE C. ALLEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Lawrence Allen, Jr. appeals from a judgment convicting him of armed robbery after a jury trial and from a postconviction order rejecting his claim of ineffective assistance of trial counsel for not presenting medical evidence that he was physically incapable of committing the armed robbery. The circuit court also rejected Allen's challenge to the State's use of a

peremptory strike to remove the only African-American from Allen's jury. We conclude that the circuit court did not err in either respect. We affirm.

¶2 The circuit court denied Allen's ineffective assistance of trial counsel motion without holding an evidentiary hearing. We review whether the circuit court erred in doing so. *State v. Phillips*, 2009 WI App 179, ¶¶16-17, 322 Wis. 2d 576, 778 N.W.2d 157. A circuit court may, in its discretion, deny such a motion without an evidentiary hearing if the motion fails to allege sufficient facts, if the motion makes only conclusory allegations "or if the record conclusively demonstrates that [the defendant] is not entitled to relief." *Id.*, ¶17 (citation omitted).

¶3 Allen's motion alleged that his trial counsel failed to investigate or introduce evidence at trial that Allen has a severe back condition that would have precluded the type of mobility and physical activity in which the armed robber allegedly engaged on September 17, 2011. Allen argued that a June 21, 2011 medical report supported his disability claim, but trial counsel did not offer this report to the court or the jury. Allen submitted the June 21 medical report with his postconviction motion alleging ineffective assistance of counsel. That document describes Allen's back pain and how it manifests. However, the report does not state that Allen requires a cane or other assistance to ambulate.

¶4 The evidence at trial was that Allen was using a cane when he approached the victim, held a knife against the victim's throat, robbed him, and hurriedly left the scene on foot with his cane. The court found that the June 21 medical report did not state that Allen had any limitations or special mobility requirements. The court deemed the report "neutral" on the question of whether Allen needed to use a cane. The court concluded that counsel did not perform

deficiently, and Allen was not prejudiced by the absence of the June 21 report from the jury trial. The circuit court rejected Allen's ineffective assistance claim without a hearing.

¶5 To establish ineffective assistance of counsel, "a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance." *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.*, ¶27. Whether trial counsel's performance was deficient and prejudicial presents a question of law that we review independently. *Id.* We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 We agree with the circuit court's assessment of the significance of the June 21 report: the report does not establish that Allen was physically unable to commit the armed robbery in the manner described by the victim. The issue at trial was identification. Evidence that Allen used a cane was before the jury, the armed robber used a cane, the victim was familiar with Allen, the victim followed Allen to an apartment and then called police, and the victim identified Allen in a photo array. The evidence was more than sufficient to convict Allen of armed robbery.

¶7 Allen was not prejudiced by his trial counsel's failure to offer the June 21 report at trial. As the record conclusively demonstrated that Allen was not entitled to relief, the circuit court did not err in denying Allen's ineffective assistance motion without a hearing. *See Phillips*, 322 Wis. 2d 576, ¶17.

¶8 Allen, who is African-American, argues that the circuit court erroneously denied his *Batson*¹ motion challenging the State's use of a peremptory strike to remove Garrick F., the only African-American among Allen's potential jurors. During voir dire, juror Garrick F. admitted that he had a twenty-year-old property crime conviction, but he still felt he could be a fair and impartial juror. The State struck Garrick F. and another potential juror, who was white, who also had a prior conviction. After the jury was selected, Allen raised a *Batson* challenge to the removal of Garrick F. The State countered that Garrick F.'s convictions for criminal trespass to a dwelling and theft were a legitimate basis for striking him from the jury. In addition, the State observed that Garrick F. did not appear to be paying attention during voir dire. The court found that the State had a legitimate basis for striking Garrick F. and rejected Allen's *Batson* challenge.

¶9 The State's strikes of potential jurors are subject to review under the Equal Protection Clause for a discriminatory purpose. *State v. Lamon*, 2003 WI 78, ¶¶26-27, 262 Wis. 2d 747, 664 N.W.2d 607.

First, in order to establish a prima facie case of discriminatory intent, a defendant must show that: (1) he or she 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) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race.

Id., ¶28 (citations and footnote omitted). If the defendant establishes a prima facie case, the burden shifts to the State to provide a neutral, non-race-based reason for striking the potential juror. *Id.*, ¶¶29-30. The circuit court then determines

¹ *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986).

“whether purposeful discrimination has been established,” a burden the defendant must meet. *Id.*, ¶32.

¶10 While Allen established a prima facie case that he and Garrick F. are members of the same cognizable group, the State offered a neutral reason for striking Garrick F. and another juror: prior criminal convictions. Allen offers no authority for the proposition that a potential juror’s prior criminal conviction is not, in and of itself, a neutral reason to strike that individual from the jury. We agree with the circuit court that Allen did not meet his burden to show that the State engaged in purposeful discrimination when it struck Garrick F. from Allen’s jury.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

