COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3204-CR **Cir. Ct. No. 2005CF3256**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES T . BLUNT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, J. James T. Blunt, *pro se*, appeals the judgment, entered following a jury trial, convicting him of first-degree intentional homicide while armed with a dangerous weapon, as a party to the crime, contrary to WIS. STAT.

§§ 940.01(1)(a), 939.63, and 939.05 (2005-06).[1] On appeal, Blunt claims that the trial court erred when it denied his motion to suppress; that there was insufficient evidence to support his conviction; and that there was racial discrimination in the jury selection process preceding his trial. Because the trial court's findings of fact during the suppression motion were not clearly erroneous; because the evidence was sufficient to support Blunt's conviction; and because Blunt forfeited his ***Batson*** challenge by failing to make a timely objection, we affirm.[2]

I. BACKGROUND.

¶2 On April 26, 2005, police were dispatched to a street corner in the City of Milwaukee where they found Andre Flowers on the ground having suffered two gun shot wounds. Paramedics pronounced Flowers dead at the scene.

¶3 At trial, John Davis testified that prior to the shooting he had been talking to Flowers when a white SUV pulled up and two men got out and began walking toward Davis and Flowers. The shorter of the two men pulled out a gun and Davis ran. He heard two gunshots and saw that Flowers was on the ground. Davis testified that the two men who had approached them then ran back to the white SUV. In court, Davis identified Blunt as the man who had the gun and testified that he saw Blunt shoot Flowers.

¶4 Darrison Deboe testified that he was with Blunt on the date of the shooting and that he and Blunt decided to rob Flowers, who had previously fired

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

shots at Blunt and Deboe while they were at a party. Deboe and Blunt left Blunt's house on the day of the shooting and got into a white SUV driven by Blunt's uncle. Blunt's uncle took Deboe and Blunt to an area they knew Flowers frequented so that they could rob him. Upon arriving, Deboe and Blunt got out of the vehicle and walked toward Flowers. Deboe testified that Blunt pulled out a gun, at which point Flowers and another person who was with him ran.[3] Deboe ran back to the white SUV. After hearing a gunshot, Deboe turned around and saw Blunt fire another shot at Flowers, who was on the ground. Blunt then got into the SUV and they left the scene.

¶5 A detective who interviewed Blunt read the jury the statement that resulted from the interview wherein Blunt admitted to having shot Flowers twice. In the statement, Blunt told the detective that he fired a gun two times while pointing it in Flowers' direction. According to the statement, upon seeing Flowers fall to the ground following the first shot, Blunt walked up to where Flowers was and fired the gun a second time "'in order to teach [Flowers] a lesson.'"

¶6 In addition to reading the statement provided by Blunt, the State allowed the detective to read a statement that was provided to him by Brian Harris, who refused to testify at trial. In the statement, Harris told the detective that Deboe claimed to have shot Flowers.

¶7 The defense called Stepfhonal Overton and Winter Ward as witnesses during Blunt's trial. Overton testified that prior to Flowers' death, he attended a party where Flowers fired shots following a commotion on the street

[3] Trial testimony revealed that Deboe was taller than Blunt.

between some women and Deboe; however, according to Overton, Blunt was not present at the party. Ward testified that she was Blunt's girlfriend and had been with him the night Flowers was killed. Blunt did not testify.

¶8 Prior to trial, Blunt moved to suppress statements he made to police. The trial court conducted a ***Miranda-Goodchild*** hearing, at which an investigating detective and Blunt testified.[4]

¶9 At the hearing, the detective testified that Blunt was arrested on June 7, 2005, at 6:15 p.m. The detective began interviewing Blunt at 8:29 p.m. and concluded at 5:10 a.m. the following day. Prior to the start of the interview, the detective offered Blunt a beverage. After Blunt declined, the detective read Blunt his ***Miranda*** rights. Blunt indicated that he understood the rights that were read to him, having been read them on a prior occasion unrelated to the incident at issue, and was willing to make a statement. Blunt never signed anything to indicate that he had been read his ***Miranda*** rights.

¶10 When asked whether he was under the influence of drugs or alcohol, Blunt told the detective that he drank alcohol and smoked marijuana two hours prior to the interview. To the detective, Blunt appeared to be coherent and the alcohol and marijuana did not seem to be affecting him. During the interview, Blunt admitted that he shot Flowers.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). If the defendant moves to suppress his or her statements because of law enforcement's failure to timely warn of the risks and consequences of self-incrimination (***Miranda***), or the voluntariness of the statements (***Goodchild***), the trial court conducts an evidentiary (***Miranda-Goodchild***) hearing to determine the validity of the accused's statements and whether suppression is warranted.

¶11 According to the detective, there were approximately two hours and twenty-five minutes worth of breaks during the eight and one-half hour interview. The detective relayed that the first break occurred within sixteen minutes of the start of the interview after Blunt vomited in the interview room. A half-hour break was taken, and Blunt was given water and sanitary wipes to clean his hands, face, and shoes. The interview then resumed in a different room. The detective asked whether Blunt was okay, and he testified that Blunt had no problem continuing. Blunt ultimately had six cups of water and ate two sandwiches at a later point during the interview. However, Blunt declined offers of soda, coffee, popcorn, and cigarettes.

¶12 The detective also testified that Blunt did not ask for a lawyer during the interview, nor did he assert a right of silence. No promises were made to Blunt and neither of the two detectives involved in the interview were armed. Blunt was not handcuffed during the interview. After the interview, the statement the detective had prepared was read to Blunt and the detective asked him to sign it. Blunt was given the opportunity to request that changes be made to the statement or to have language stricken; however, no such requests were made. Blunt initialed the first page, which consisted of pedigree information, but refused to sign the remaining pages. According to the detective, Blunt said the statement was true, but that he did not want to sign any page except for the first because he had been charged with a crime after signing a statement in the past. The detective testified that Blunt did not appear to be tired during the interview, nor did Blunt complain about being tired or make any requests during the interview.

¶13 The same detective was present during an interview with Blunt the following day. According to the detective, Blunt was read his rights. The

interview lasted from 7:42 p.m. until 10:20 p.m., and a second statement was taken. Blunt again refused to sign the statement that resulted from the interview.

¶14 Blunt testified at the hearing that he was nineteen years old and had a ninth-grade education. He claimed that at the time of the interview he was feeling the aftershocks of intoxication. With respect to the first interview, Blunt acknowledged that the detectives did not threaten, physically abuse, or swear at him. Blunt did not recall having been read his ***Miranda*** rights. He testified that he was not feeling well, but that he never asked the detectives to stop the interview because he was never told that he had a right to remain silent. He also denied being given sandwiches during the interview, and instead, testified that he was given food when he went back to his cell at the end of the interview. Blunt acknowledged seeing the detective write out his statement, but claimed the statement was never read to him and he was never asked to sign it. He denied that the initials at the bottom of the first page of the statement that resulted from the first interview were his.

¶15 Blunt testified that he was not read his rights during the second interview. He acknowledged that he was not handcuffed, nor was he threatened or forced to speak. However, Blunt testified that he did not talk to the detectives voluntarily because "[he] didn't know what was going on and then all that wasn't familiar to me, so [he] didn't really know what was happening and [he] didn't know the situation." Blunt recalled that the detectives wrote out another statement and went over it with him, but said that he was never asked to sign the second statement.

¶16 The trial court denied Blunt's motion to suppress based on its conclusion that the State had met its burden with respect to the ***Miranda*** issues

and the voluntariness of the statements, noting specifically "that the statements, both statements were a voluntary product of free and unconstrained will reflecting deliberateness of choice and not a product of any type of improper behavior by the police."

¶17 Blunt was convicted following a jury trial and was sentenced to life in prison with eligibility to apply for release in February 2038. Blunt now appeals. Additional facts will be provided in the analysis section as necessary to the discussion of Blunt's claims.

II. ANALYSIS.

A. The trial court properly found that Blunt's statements to police were admissible.

¶18 Blunt's first argument is that the trial court erred when it denied his motion to suppress the statements he gave to police.[5] He relies on his testimony during the suppression hearing that he could not recall being read his ***Miranda*** rights during the first interview and points to the fact that he never signed a form acknowledging having been read those rights. Blunt further contends that his statement was not voluntary because he was under the influence of alcohol and drugs and asserts that his vomiting was "likely due to excessive consumption of liquor and drugs" evidencing his "constrained will." Blunt submits that upon observing his vomiting, the detective interviewing him should have ceased all questioning and inquired whether he needed medical attention; instead, Blunt

[5] Blunt's "official misconduct" argument is addressed in this section because he challenges the credibility of the detective who testified during the ***Miranda-Goodchild*** hearing.

relays that the detectives "took advantage of a sick suspect, and overpowered his constrained will."

¶19 The State has the burden of proving, by a preponderance of the evidence, the sufficiency of the ***Miranda*** warnings and the knowing and intelligent waiver of ***Miranda*** rights. ***State v. Santiago***, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996). We review those determinations *de novo*. *See* ***id.*** at 18. The State also has the burden of proving the defendant's statements were voluntary. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. We review that determination without deference as well. *See* ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987). In both cases, it is the application of the constitutional standard to historical facts that is the question of law. ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594 (Ct. App. 2003). We will uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Henderson***, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

¶20 "The fourteenth amendment prohibits involuntary statements because of their inherent unreliability and the judicial system's unwillingness to tolerate illegal police behavior." ***State v. Pheil***, 152 Wis. 2d 523, 535, 449 N.W.2d 858 (Ct. App. 1989). Courts will look at the totality of the circumstances when making determinations as to voluntariness. ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). "The ultimate determination of whether a confession is voluntary under the totality of the circumstances standard requires the court to balance the personal characteristics of the defendant against the pressures imposed upon him by police in order to induce him to respond to the questioning." ***Id.***

> [C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment, but coercive activity does not, in and of itself, establish involuntariness.... [A] trial court should not undertake the balancing analysis [between personal characteristics and coercive police activity] unless some improper or coercive police conduct has occurred.

State v. Deets, 187 Wis. 2d 630, 635-36, 523 N.W.2d 180 (Ct. App. 1994) (citations and quotation marks omitted; first bracket in ***Deets***).

¶21 After reviewing the record, we independently conclude that Blunt's statements were voluntary. There is no evidence of any coercive police activity in the record before us, and indeed, Blunt never makes this argument, choosing instead to argue that that he was sick from intoxication. He argues: "[T]he record is factually clear, that Blunt was so sick and subdued by the effects of his drinking and drug use earlier that day, that he could not remember people's names or their exact dates of birth." The detective who interviewed Blunt asked him if he wanted to stop after he vomited, and the detective's testimony, which the trial court found credible, was that Blunt had no problem continuing. Whether the names and birth dates Blunt gave to the detective during the background portion of the interview were accurate is of little consequence. We will not overturn the trial court's credibility determinations unless there is something in the record indicating that they were clearly erroneous and there is nothing here to that effect.

¶22 The trial court resolved the conflicting testimony offered during the hearing against Blunt, finding that the detective gave Blunt his ***Miranda*** warnings and that Blunt had understood them.[6] The court further found that although Blunt

[6] As Blunt points out, the trial court made the following erroneous statement when ruling on his suppression motion:

(continued)

was sick, he understood his rights and freely, knowingly, and voluntarily continued the interview. Implicit in these findings is the trial court's conclusion that Blunt's testimony to the contrary was not credible. *See* ***State v. Echols***, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993). Because these findings are not clearly erroneous, we conclude that the trial court properly denied Blunt's motion to suppress.[7]

B. The evidence was sufficient to support Blunt's conviction.

¶23 Next, we, like the State, construe Blunt's brief as challenging the sufficiency of the evidence to support his conviction. Blunt references Harris's

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> The *defendant* testified that rights were read from a Justice card and as stated on the record—the rights as read as stated on the record and the feedback that the detective understood was that the defendant understood what his rights were and the fact that he could read and write and based upon his pedigree and that he had previous dealings with the police department or some other law enforcement agency where other rights were in fact given, so the defendant was not a novice as to being in custody. And those are … circumstances the Court takes into consideration.

(Emphasis added.) It is the first reference to "defendant" that Blunt takes issue with as he never testified that his rights were read from a Justice card; instead, it was the detective who testified to this effect. When the first sentence of the above-referenced excerpt is read in context, it is apparent to this court that the initial reference to "defendant" should have been a reference to "detective"; apparently, this was how it was perceived as neither the prosecutor nor Blunt's attorney corrected the trial court. Moreover, the trial court rectified its earlier misstatement when it later noted that Blunt did not recall the reading of his ***Miranda*** rights during the first interview.

[7] To the extent Blunt argues that there was impropriety in the fact that his statements were not videotaped or audiotaped, he cites no authority that compels this conclusion and as such we need not consider it. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 ("We need not consider arguments unsupported by reference to legal authority."). We nevertheless note that there was no requirement that his statement be recorded on the dates he was interviewed in connection with this incident. *Cf.* WIS. STAT. § 968.073 (eff. Jan. 1, 2007); 2005 Wis. Act. 60, §§ 31, 51.

statement that Deboe bragged to Harris that Deboe shot Flowers. Blunt argues that Deboe contradicted himself at trial when he denied saying he was the shooter.

¶24 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the [S]tate 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). Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the witnesses and drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

¶25 In order to obtain a conviction for first-degree intentional homicide, the State needed to establish: (1) that Blunt caused Flowers' death; and (2) that Blunt intended to kill Flowers. *See* WIS. STAT. § 940.01(1)(a) (2005-06); *see also* WIS JI—CRIMINAL 1010. However, because Blunt was charged as a party to the crime, he could be charged with and convicted of first-degree intentional homicide even if he did not directly commit the crime. *See* WIS. STAT. § 939.05.

¶26 As relayed above, the jury heard both Davis's and Deboe's eyewitness identifications of Blunt as the man who shot Flowers. The jury also heard the detective's testimony that during Blunt's interview Blunt admitted to having shot Flowers twice, and that upon seeing Flowers fall to the ground following the first shot, Blunt walked up to where Flowers was and fired the gun a second time "'in order to teach [Flowers] a lesson.'" The detective read from the statement: "Blunt states on the second shot, quote, 'I was standing over [Flowers]

and pointed the gun at him and closed my eyes and just fired.'" A Milwaukee County medical examiner testified that Flowers sustained two gun shot wounds, one to the head and one to his lower back. In addition, the medical examiner testified that based on the gun powder fragments found on the sweatshirt Flowers was wearing, one shot was fired at Flowers within a range of approximately three to four feet.

¶27 We conclude that the evidence presented is sufficient to support the verdict. The jury heard the evidence presented by Blunt—namely, that he was not present at the party where Flowers allegedly shot at Deboe and others, that Deboe claimed to have shot Flowers, and his alibi defense that he was with his girlfriend the night Flowers was killed—and nevertheless found Blunt guilty. To the extent there were contradictions in the testimony presented, it was the jury's job to resolve them. Moreover, we note that Blunt was convicted as a party to the crime; therefore, even if the jury believed the evidence presented indicating that Deboe shot Flowers, the evidence was nevertheless sufficient to show that Blunt aided and abetted Deboe. *See* WIS. STAT. § 939.05(2).

C. Blunt forfeited his ***Batson*** *challenge by failing to make a timely objection.*

¶28 Finally, Blunt argues that there was discriminatory jury selection due to the fact that there was one African-American person left on the jury panel after the peremptory strikes were made. He argues that the prosecution struck African-American jurors from the panel without justifiable cause.

¶29 According to ***Batson v. Kentucky***, 476 U.S. 79 (1986), a defendant's right to equal protection of the law is violated where the State uses a peremptory challenge to remove a potential juror from the venire solely because of race. *See* ***id.*** at 84; *see also* ***State v. Gregory***, 2001 WI App 107, ¶6, 244 Wis. 2d 65, 630

N.W.2d 711. "Wisconsin has adopted the ***Batson*** principles and analysis." ***State v. Lamon***, 2003 WI 78, ¶22, 262 Wis. 2d 747, 664 N.W.2d 607. The problem that arises for Blunt, however, is that a ***Batson*** challenge must be raised as an objection following the exercise of peremptory strikes and before the jury is sworn. *See* ***State v. Jones***, 218 Wis. 2d 599, 601, 581 N.W.2d 561 (Ct. App. 1998) ("We conclude that the defendant must make a ***Batson*** objection prior to the time the jury is sworn. If the objection is not made until after that time, the issue is [forfeited]."). [8] The record in this case reveals that no such objections were made during *voir dire*; instead, Blunt raises this issue for the first time on appeal.

¶30 Blunt's ***Batson*** challenge fails because neither he nor his lawyer objected to the strikes during *voir dire*. [9] Once the opportunity to assert an objection was missed, Blunt's ***Batson*** challenge could only be raised in the context of a postconviction motion asserting ineffective assistance of counsel. *See* ***State v. Taylor***, 2004 WI App 81, ¶¶11-16, 272 Wis. 2d 642, 679 N.W.2d 893. Blunt, however, did not file a postconviction motion alleging that he received the ineffective assistance of counsel despite being afforded numerous extensions and ample time to do so. Instead, he proceeded with the instant direct appeal. Unfortunately for Blunt, a postconviction motion raising the issue of

[8] In the recently decided case of ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, ¶29 ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Despite prior case law using the term "waiver," "forfeiture" is applicable in this context.

[9] We also note that after reviewing the transcript of the *voir dire* proceedings, it is impossible to know which jurors were African-American, which would make review difficult if we were to consider the merits of this issue.

ineffectiveness is a prerequisite to an appeal on the issue. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies.").

¶31 Because Blunt's ***Batson*** challenge is not timely, we need not address the merits of his claim. *See* ***Jones***, 218 Wis. 2d at 604 ("Only after a defendant makes a timely objection at trial will the wheels of the ***Batson*** test go into motion."). In addition, Blunt's failure to preserve the testimony of trial counsel regarding his conduct in defense of Blunt precludes us from determining whether counsel was ineffective in failing to assert a ***Batson*** challenge. Without this testimony, we have nothing upon which to judge whether Blunt's trial counsel's performance was deficient and prejudicial under ***Strickland v. Washington***, 466 U.S. 668 (1984).[10]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[10] In arguing that his right to a jury pool comprising a fair cross-section of the community was violated, Blunt claims that "over 80% of the jurors had friends and relatives in law enforcement." The trial court inquired whether the fact that someone was related to law enforcement would impair any juror's ability to come to a fair and just result, to which no juror answered affirmatively. Blunt's attorney never objected to the composition of the jury panel or sought the exclusion of any jurors on this basis; consequently, the issue was forfeited. *See* ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998) ("[W]e are persuaded that the ultimate decision whether to move to strike a potential juror for cause is for counsel to make, and counsel's failure to so move is a [forfeiture] of the defendant's right to object to that person sitting on the jury."). Again, if Blunt wanted to challenge trial counsel's ineffectiveness for not making a timely and proper challenge that the jury array failed to represent a fair cross-section of the community, he needed to do so in a postconviction motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).