

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2139-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. GOSSAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. Robert W. Gossar appeals from a judgment of conviction for attempted first-degree intentional homicide contrary to §§ 940.01(1) and 939.32(1)(a), STATS., and from an order denying his postconviction motion

for a new trial.¹ Gossar contends that the prosecutor's peremptory striking of three men from the jury panel was gender discrimination and that his trial counsel was ineffective in failing to challenge the strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986).² We disagree and affirm the judgment and the order.

The facts are undisputed. The allegation of Gossar's attempted murder of his fiancée, Crystal S., was tried to a jury selected from a panel of twenty-one jurors, which included ten men. During the voir dire, juror Dawn Oesterreich was excused by the trial court after stating that she had suffered a broken nose as the victim of a physical assault six months earlier. Oesterreich's release prompted the prosecutor to tell the remaining panel members, "Let's ... talk about something that Miss Oesterreich brought up; the issue of domestic abuse. As I told you the allegation is that the defendant assaulted his then fiancée; as you see there was a relationship there." The prosecutor then asked the jurors "whether any of you personally or some one you know close has been involved in [a] domestic abuse type of relationship." Jurors William Fenlon and Gina Olson responded affirmatively to the question and were later peremptorily struck by Gossar. Juror Jessie Miller also answered affirmatively and was later peremptorily struck by the prosecutor.

¹ The trial court also denied Gossar's postconviction motion for a modification of his sentence. Gossar does not appeal from that part of the order.

² In *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), the United States Supreme Court held that a defendant's right to an impartial jury is violated when a venireperson of the same race as the defendant is excluded from the jury for that reason. The intentional use of gender when selecting jurors also violates a defendant's right to an impartial jury under the *Batson* rule. See *State v. Joe C.*, 186 Wis.2d 580, 585, 522 N.W.2d 222, 224 (Ct. App. 1994); see also *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994).

In addition to Miller, the State struck three other men from the jury panel—Robert Houle, Kevin Gill and Rick Larson—none of whom had responded to the prosecutor’s domestic abuse inquiry.³ Gossar’s trial counsel never objected to or challenged the prosecutor’s peremptory strikes of the three men. In addition to Fenlon and Olson, Gossar peremptorily struck two female jurors—Angelia Kroll and Annette Leslie—leaving seven women and six men to be sworn in as a jury of thirteen. Juror Mitchell Jezior was later designated as the alternate juror and excused. The final jury of seven women and five men returned a guilty verdict.

Gossar presents the appellate issue as whether the trial court erred as a matter of law during his postconviction motion when it found that he had not established a prima facie case of gender discrimination. The State points out, however, that Gossar never objected to the prosecutor’s peremptory strikes during the trial and that the appellate issue raised in this appeal, as in his postconviction motion, is one of ineffective assistance of trial counsel. We first address the ineffective counsel issue.

To establish ineffective counsel, Gossar must show that his counsel’s performance was deficient and that it prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Review of trial counsel’s performance is premised upon great deference to the defense attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *See State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). “Rather,

³ In response to a question from the prosecution concerning recent police contact, juror Robert Houle stated that “I had a party Saturday night and the police came over to turn the music down.”

the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *Id.* at 127, 449 N.W.2d at 847-48.

In response to Gossar's ineffective trial counsel motion, the trial court held the evidentiary hearing mandated by *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). At the *Machner* hearing, Gossar's trial counsel testified that he was aware of the law concerning the use of peremptory strikes based on gender bias, that reasons other than gender existed for the prosecutor's peremptory striking of the three male jurors, and that the prosecutor peremptorily struck a female juror and struck juror Houle for gender-neutral reasons. Trial counsel also stated that because the prosecutor "had [a gender-neutral] reason to strike Mr. Houle" and because he did strike a female juror, "having [a *Batson*] hearing would not be successful." Trial counsel concluded that he did not think the prosecutor's striking of the other two male jurors was based on gender discrimination.

Trial counsel testified that "upon observations of the jurors and questions that were asked during the course of voir dire that the reasons that these individuals were struck was not because of gender bias but other reasons." In the exercise of peremptory strikes a party may rely on a juror's appearance and on nonverbal responses. See *Purkett v. Elem*, 514 U.S. 765, 769 (1995). Trial counsel determined during the jury selection process that he could not successfully show that the prosecutor had relied on gender in exercising the peremptory challenges. Counsel cannot be faulted for not bringing a motion that would have failed. See *State v. Simpson*, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994). Trial counsel further stated that it would not be beneficial to his client to raise issues that were not meritorious. No further testimony was taken

during the *Machner* hearing concerning Gossar's ineffective assistance of counsel claim.

The trial court rejected Gossar's contention that trial counsel was deficient in not requesting a *Batson* hearing after noting that two of the prosecutor's peremptory strikes were not gender-based and that the gender split on the thirteen-person jury did not require trial counsel to request that the prosecutor "explain ... why he struck two men out of his four strikes." The trial court concluded, "I don't find ... there was ineffective assistance of counsel." Whether there has been ineffective assistance of counsel is a mixed question of law and fact. See *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). We will not overturn a trial court's findings concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. See *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). The trial court's findings are not erroneous. We agree with the trial court that Gossar's trial counsel was not ineffective.

We now turn to Gossar's contention that he is entitled to postconviction relief apart from the ineffective counsel issue based upon a prima facie showing that the prosecution's jury strikes were gender related. The trial court refused Gossar's request that the prosecutor testify at the *Machner* hearing and held that Gossar had failed to establish a prima facie case of gender discrimination. Citing *State v. Jagodinsky*, 209 Wis.2d 577, 563 N.W.2d 188 (Ct. App. 1997), Gossar contends that he was entitled to call the district attorney as a witness during the *Machner* hearing to establish why the three male jurors were struck peremptorily and that the trial court erred as a matter of law in holding that Gossar had failed to establish a prima facie case for gender discrimination. We conclude that the trial court ruled correctly.

Jagodinsky is distinguishable. Jagodinsky's trial counsel timely objected to the prosecutor striking only men from the jury panel and the trial court promptly held a hearing in chambers on the gender-bias challenge. See *id.* at 581, 563 N.W.2d at 190. The prosecutor admitted that the strikes were gender based in part, and we concluded that Jagodinsky had met his burden of establishing a prima facie case of gender discrimination. See *id.* at 583, 563 N.W.2d at 191. Unlike Jagodinsky, however, Gossar did not timely challenge the prosecution strikes as gender based and his reliance on *Jagodinsky* is therefore misplaced.

Gossar's failure to raise a *Batson* objection until after the jury was sworn waived his right to challenge the gender neutrality of the prosecution's jury strikes. See *State v. Jones*, 218 Wis.2d 599, 601, 581 N.W.2d 561, 562 (Ct. App.), review denied, 219 Wis.2d 923, 584 N.W.2d 123 (1998). In *Jones*, the prosecutor peremptorily struck three minority jurors from the panel, and after the jury was sworn Jones challenged the strikes as racially motivated. We held that a defendant must make a *Batson* objection prior to the time the jury is sworn or the issue is waived. We are bound by our own prior holdings. See *Cook v. Cook*, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997). Gossar waived his right to challenge the prosecution's peremptory strikes as discriminatory by failing to object to the strikes prior to the selected jurors being sworn.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

