COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2059-CR **Cir. Ct. No. 00 CF 81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FONTAINE L. BAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Fontaine L. Baker appeals from a judgment convicting him of first-degree reckless homicide while armed, following a jury trial. He also appeals from an order denying his motion for postconviction relief. He contends that: (1) insufficient evidence supported the jury's verdict; (2) trial counsel was ineffective for failing to remove an allegedly biased prospective juror,

either by seeking her removal for cause or by using a peremptory strike; (3) the trial court erroneously evaluated his ***Batson*** challenge to the prosecutor's removal of two African-American members of the venire;[1] and (4) the trial court erroneously excluded evidence critical to his defense. We affirm.

I. BACKGROUND

¶2 Baker was charged with first-degree intentional homicide while armed for the January 2, 2000 killing of thirteen-year-old Frankie Jenkins. In the same complaint, Dontrell LeFlore[2] was charged with the first-degree intentional homicide while armed of Tillie Mitchell. Neither was charged as party to the crime of the other killing; the theory, however, was that Baker's killing of Jenkins related to Jenkins's knowledge of LeFlore's killing of Mitchell and his (Baker's) participation in the events leading to Mitchell's death.

¶3 The trial evidence established that on the New Year's Eve 1999, Baker and three friends, LeFlore, Alphonso Miller and Tywee Turner, met Frankie Jenkins, Brenda Green and another girl, identified only as Baby Doll, at a liquor store. The girls accompanied the men to a party, where they stayed until about 10:30 p.m., when Green and Baby Doll decided to leave. Jenkins remained at the party until midnight when she, Baker, and Baker's friends left to buy cigarettes. While traveling in the vicinity of 41st Street, LeFlore told his friends to park the car and wait for him while he took care of some business. Miller testified that shortly after LeFlore exited the car, he (Miller) heard gunshots. Moments later,

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

[2] The record contains two variations of Dontrell LeFlore's name; it appears as LaFlore and LeFlore.

LeFlore returned to the car and said that he had shot someone, later identified as Tillie Mitchell. According to Miller, Baker then yelled at LeFlore, telling him to shut up because Jenkins was in the car.

¶4 Miller also testified that after the shooting, he, Baker, LeFlore and Jenkins went to a residence on 36th Street to spend the night. The following day, the men dropped Jenkins off at home, only to retrieve her later that afternoon. That evening, Baker obtained a bullet from Darren Alexander and then, in the company of Miller, drove to an alley in the area of 17th and Keefe. According to Miller, Baker then exited the car, asked Jenkins to come with him, and the two walked down the alley. Miller said that while he was waiting in the car, he heard a single gunshot. Moments later, Baker returned to the car and said that he had just "offed that bitch." The men then fled.

¶5 The following afternoon, Baker took a bus to Chicago, where he was arrested on January 12. After making various statements denying the offense and implicating others, Baker finally acknowledged that he had killed Jenkins but claimed that the shooting was accidental. At trial, Baker testified that on the night of her death, Jenkins had repeatedly asked him if she could fire the gun, noting her excitement about having fired one the previous night. He said he accompanied her to an alley, where she attempted to shoot at some dogs which were penned in a yard off the alley. According to Baker, the gun jammed and he took the gun from Jenkins and attempted to fix it. Explaining what occurred, Baker said: "So I grab it, I'm like here. . . . So I got the gun like this in my hand, I get to shaking it. I'm shaking it, the shell pop out, and I let the slide go, and the gun go off."

¶6 The trial court instructed the jury on first-degree intentional homicide, first-degree reckless homicide, second-degree reckless homicide, and

homicide by negligent handling of a dangerous weapon. The jury convicted Baker of first-degree reckless homicide.

II. ANALYSIS

A. Sufficiency of Evidence

¶7 Baker first argues that the evidence was insufficient to disprove his claim that the shooting was an accident. His argument has no merit.

¶8 The supreme court has explained:

> Regardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt.
>
> ….
>
> The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the [fact finder] cannot find the defendant guilty. The function of the [fact finder] is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The [fact finder] can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. *Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence which the [fact finder] believes and relies upon to support its verdict.*
>
> … The appellate standard of review of the sufficiency of evidence to support a conviction is the same whether the evidence presented at trial is direct or circumstantial.
>
> Under that standard, commonly referred to as the reasonable doubt standard of review:
>
> > 'The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any of the members thereof

> are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true…. The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ….'

State v. Poellinger, 153 Wis. 2d 493, 502-04, 451 N.W.2d 752 (1990) (emphasis added; citations and footnotes omitted).

¶9 Ample evidence disproved Baker's claim that the shooting was accidental. First, the forensic evidence indicated that Jenkins's shooting was not accidental. Douglas Kelley, a Milwaukee County assistant medical examiner, testified that Jenkins died as the result of a single, fatal gunshot wound. He explained that the bullet traveled horizontally into Jenkins's brain, entering at Jenkins's "right temple, right about the hairline, and travel[ing] from left to right and from front to back, exiting her skull, just to the right of midline and the posterior skull" but "remaining under the skin."

¶10 Second, trial testimony supported the State's theory that Baker did not kill Jenkins accidentally. Alphonso Miller testified that after the shooting, Baker returned to the car and reported that he had just "offed the bitch." He also testified that after they fled the scene, they went to Baker's girlfriend's house where Baker poured bleach on his hands.

¶11 Finally, Baker's own actions after the shooting refute his defense of accident: Baker failed to aide Jenkins after the shooting, choosing instead to flee;

the following afternoon, Baker went to Chicago. After his arrest, Baker changed his story several times, first saying he had not been in Milwaukee in months, then implicating Miller in the killing, and finally admitting that he did it but claiming it was an accident. In light of this evidence, the jury reasonably rejected Baker's claim that his shooting of Jenkins was accidental.

B. Effective Assistance of Counsel

¶12 Baker next argues that counsel was ineffective for failing to move to strike a juror for cause and, further, for failing to use a peremptory strike to remove that juror. He also contends that the trial court erred in denying his request for a ***Machner*** hearing on this issue.[3] We disagree.

¶13 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶14 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

State v. Harvey, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶15 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief and thus entitles a defendant to a hearing is a legal issue, which we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶16 Baker contends that juror Kathleen Ehlinger's answers during voir dire established her "subjective bias." *See* ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). Baker claims that Ehlinger's response to the prosecutor's question about whether she would be affected by the fact that a child was killed, established her bias, and further, that defense counsel was ineffective for failing to either move for her removal or exercise a peremptory strike to remove her. We cannot agree.

¶17 To determine whether a juror exhibits subjective bias, a circuit must examine the juror's demeanor and responses to voir dire questions to discern whether "the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have." ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). On review, this court will uphold the circuit court's factual findings unless they are clearly erroneous. *See* ***id.***

¶18 In response to the prosecutor's question about the killing of a child, Ehlinger answered: "I have a fourteen-year-old. It may be difficult." Then, when asked if she could follow the instructions, she answered, "I would attempt to." Baker claims that this established subjective bias; that, at the very least, counsel was ineffective for failing to further question this juror. Baker, however, ignores the record which establishes that one of his lawyers did pose follow-up questions. Addressing the entire jury pool, counsel asked:

> Can you all give a fair trial to a man accused of shooting a thirteen-year-old girl? I know some of you have children. You're all human beings. Can you all put that aside? Are you able to give him a fair trial despite what they claim he did? Would you all do that for him? Anybody who can't?"

One juror indicated an inability to set her feelings aside. Ehlinger remained silent. By remaining silent, Ehlinger indicated her willingness to act impartially and to set aside any bias. Thus, the record refutes Baker's factual premise; there was no deficient performance. Accordingly, the trial court properly denied Baker's request for a ***Machner*** hearing.

C. Hearsay Evidence

¶19 Baker next argues that the court erroneously excluded evidence supporting his defense. He contends that the court should have allowed the introduction of hearsay testimony from Brenda Green that, upon her return home that New Year's Day, Jenkins told her that on New Year's Eve she had been with guys (presumably Baker and LeFlore) and that they had let her shoot a gun. Because Baker's accident defense involved him allowing Jenkins to shoot a gun, and the gun jamming, Baker contends that Jenkins's statement to Green was "necessary to corroborate [his] credibility, and his claim of accident." We disagree.

¶20 The admission of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an erroneous exercise of discretion. ***State v. Stevens***, 171 Wis. 2d 106, 111-12, 490 N.W.2d 753 (Ct. App. 1992). An erroneous exercise of discretion is a decision which is based on an erroneous view of the law. ***State v. Buelow***, 122 Wis. 2d 465, 476, 363 N.W.2d 255 (Ct. App. 1984). Whether hearsay evidence is admissible under a hearsay exception presents a question of law, which we review de novo. ***Stevens***, 171 Wis. 2d at 112.

¶21 On appeal, Baker maintains that the hearsay statement was admissible to establish Jenkins's state of mind, under WIS. STAT. § 908.03(3) (1999-2000),[4] as residual hearsay under § 908.045(6), and under the rule of completeness, *see* ***State v. Sharp***, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App.

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

1993). In the trial court, however, Baker only argued for admissibility under the residual hearsay exception, and thus, we will not address his additional theories on appeal. ***State v. Konrath***, 218 Wis. 2d 290, 296 n.8, 577 N.W.2d 601 (1998) (generally, appellate court will not consider arguments raised for the first time on appeal).

¶22 As this court has reiterated, the residual hearsay exceptions under WIS. STAT. § 908.045(6) requires the proponent to establish circumstantial guarantees of trustworthiness comparable to those existing for the enumerated exceptions. ***Stevens***, 171 Wis. 2d at 120. This exception, for the novel or unanticipated hearsay that does not fall under one of the named categories, is to be used very rarely and, in this court's view, "the key to using the exception is governed by the circumstances surrounding the making of the hearsay statement." ***Id.*** (emphasis omitted).

¶23 In this instance, the court did not err by excluding the hearsay statement from Green. Baker failed to carry his burden in arguing for the admission of the statement; he failed to offer any argument establishing "circumstantial guarantees of trustworthiness," ***id.*** 120, for Green's statement. Absent this showing, the statement does not fit within the exception and, accordingly, was not admissible.[5]

[5] Further, we note that Baker could have directly elicited the evidence, if it existed, from Miller. Baker claimed that Jenkins fired Miller's gun twice at the New Year's Eve party. Miller testified, corroborating much of Baker's testimony about the party, including details such as who was in attendance and what they were doing. Yet at no point did Miller testify about Jenkins firing a gun at the party.

D. ***Batson*** Challenge

¶24 Finally, Baker contends that the trial court applied the wrong standard in determining whether he had met his prima facie burden under ***Batson*** challenging the State's removal of two of the five African-American members of the venire. Baker maintains that the trial court's comment that defense counsel had failed to demonstrate a "systematic exclusion" necessary to establish a prima facie ***Batson*** challenge exhibits its misunderstanding of the law. Baker is incorrect.

¶25 When raising a ***Batson*** objection to the prosecution's use of its peremptory strikes, the defendant must make a prima facie showing of purposeful discrimination by establishing that the prosecution has exercised peremptory challenges on the basis of race or gender. *See* ***State v. Jagodinsky***, 209 Wis. 2d 577, 580, 563 N.W.2d 188 (Ct. App. 1997). Once the defendant has done so, the burden shifts to the prosecution to articulate race or gender-neutral reasons for striking the jurors. *See* ***id.*** The trial court must then decide whether the defendant has proven purposeful discrimination by the prosecution. *See* ***id.***

¶26 To determine whether a defendant has made a prima facie case, a trial court may consider all relevant factors, including "whether the prosecution has eliminated all members of the defendant's race from the panel of prospective jurors." ***State v. Walker***, 154 Wis. 2d 158, 173-74, 453 N.W.2d 127 (1990). If the defendant makes a prima facie showing, creating an inference of purposeful discrimination, the prosecutor must offer race-neutral reasons for the removal of the potential jurors. ***State v. Gregory***, 2001 WI App 107, ¶8, 244 Wis. 2d 65, 630 N.W.2d 711. Finally, if the prosecutor offers a race-neutral explanation, "the

circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established." ***Id.*** (citation omitted). On appeal, this court will not reverse the trial court's decision absent an erroneous exercise of discretion. ***Id.*** at ¶5.

¶27 Here, the trial court found that Baker had not made a prima facie case establishing purposeful discrimination. Baker, however, argues that the court erred by requiring him to establish "systematic discrimination." As noted, however, among the factors a trial court can consider is whether the prosecutor "has eliminated all members of the defendant's race from the panel." ***Walker***, 154 Wis. 2d at 173-74. While ***Walker*** goes on to explain that even the elimination of all members of a defendant's race does not "automatically" establish a prima facie case, *see* ***id.*** at 174 n.7, that does not mean that such "systematic discrimination" would not properly be among the factors a court could consider. Thus, Baker has not established that the trial court applied an incorrect standard. Consequently, we conclude that the court did not err in denying Baker's ***Batson*** challenge.[6]

By the Court.—Judgment and order affirmed.

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

[6] We also note that, regardless of the standard the court used in determining whether Baker made a prima facie showing, the court further concluded that the prosecutor provided race-neutral reasons for removing two of the five African-American panel members. The prosecutor explained that one, an elderly man, "appeared to be confused" and "sat in the wrong seat," and that the other, a student, was less mature than those he wanted on the jury. Hence, the prosecutor offered plausible race-neutral reasons for his selections, and Baker's counsel failed to refute those explanations.