COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3040 **Cir. Ct. No. 2001CF6457**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO L. OLIVER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antonio L. Oliver appeals from an order denying his motion for a new trial for postconviction counsel's alleged ineffectiveness. The issues are whether postconviction counsel was ineffective for failing to pursue trial counsel's failures to object to potential ***Batson*** violations and to the trial

court's *ex parte* communication with the jury during deliberations.[1] We conclude that Oliver has not shown that postconviction counsel was ineffective for failing to pursue the waiver of a ***Batson*** objection when the record demonstrates race-neutral reasons for the State's peremptory strikes, and for failing to pursue trial counsel's failure to object to what was a harmless error. Therefore, we affirm.

¶2 A jury found Oliver guilty of felony murder while attempting to commit an armed robbery, as a party to the crime, for the shooting death of Rafael Pedroza. As we discussed in our decision on direct appeal:

> Oliver was directed to a vehicle operated by Pedroza and was told that Pedroza had a lot of money. Intending to rob Pedroza, Oliver walked over to the vehicle, opened the front passenger door, took out a nine-millimeter pistol that he was carrying and pointed it at Pedroza. When Oliver pointed the gun at Pedroza, Pedroza swung at him. Oliver's finger was on the trigger and the gun went off, after which Oliver said that he fired at least one additional shot.

State v. Oliver, No. 2006AP2033-CR, unpublished slip op. ¶5 (WI App July 24, 2007). Oliver admitted as much in his statement to police that he unsuccessfully challenged on direct appeal, along with the denial of his mistrial motion for the prosecutor's remarks during closing argument, and for the trial court's erroneous exercise of sentencing discretion.[2]

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[1] ***Batson v. Kentucky***, 476 U.S. 79 (1986) (State may not use race as a basis for its peremptory challenges.).

[2] Originally, Oliver's predecessor postconviction/appellate counsel pursued a no-merit appeal that we rejected in its entirety; we explained that further facts may render arguably meritorious a challenge to the trial court's denial of Oliver's motion to suppress his incriminating statements to police. *See* ***State v. Oliver***, No. 2004AP480-CRNM, unpublished slip op. at 2-3 (WI App Nov. 21, 2005). In his ensuing merit appeal, Oliver challenged, among other things, the order denying his suppression motion. *See* ***State v. Oliver***, No. 2006AP2033-CR, unpublished slip op. ¶¶15-19 (WI App July 24, 2007).

¶3 Oliver then filed a postconviction motion alleging the ineffective assistance of postconviction counsel for failing to raise trial counsel's ineffectiveness. *See* WIS. STAT. § 974.06 (2007-08).[3] The trial court conducted an evidentiary hearing and determined that Oliver had waived his claims of ineffective assistance of trial counsel.

¶4 Oliver waived his ineffective assistance claims against trial counsel in part, however, because of postconviction counsel's assessment of those potential claims and his advice against pursuing them. Consequently, we review the merits of the two ineffective assistance claims because they implicate postconviction counsel. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

¶5 To prevail on an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990). In the context of postconviction counsel's ineffectiveness for

[3] All references to the Wisconsin Statutes are to the 2007-08 version.

failing to pursue trial counsel's ineffectiveness ("counsels' ineffectiveness"), Oliver must demonstrate that postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness by postconviction motion, and if unsuccessful, by appeal.

¶6 Oliver's first ineffective assistance claim involves counsels' failure to raise and then pursue a ***Batson*** objection to the prosecutor's use of peremptory strikes to remove prospective non-white jurors.

> ***Batson*** 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 jury service for that reason. The ***Batson*** rule now applies to peremptory challenges of members of the venire panel even though they are of a different race than the defendant.

State v. Lopez, 173 Wis. 2d 724, 728, 496 N.W.2d 617 (Ct. App. 1992) (citations omitted except ***Powers v. Ohio***, 499 U.S. 400, 415-16 (1991), and how ***Powers*** extended ***Batson v. Kentucky***, 476 U.S. 79, 86-96 (1986)). To establish the prosecutor's purposeful discriminatory use of peremptory challenges, the defendant:

> "must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination."
>
> Thus, unless a defendant makes the prima facie showing that the prosecutor has used peremptory challenges on the basis of race, steps two and three of the analysis are not reached.

Lopez, 173 Wis. 2d at 728 (citation omitted).

¶7 Trial counsel failed to raise a ***Batson*** objection. Consequently, Oliver "must [preliminarily] establish that had trial counsel made the ***Batson*** objection, there is a 'reasonable probability' that it would have been sustained." ***State v. Taylor***, 2004 WI App 81, ¶17, 272 Wis. 2d 642, 679 N.W.2d 893.

¶8 Oliver is black; the victim was Hispanic. There were five prospective jurors of color. All were stricken: three by the State, one by the trial court for cause, and one by the defense. We first address the three who were stricken by the prosecutor: Edalia Garza Vega, an Hispanic woman who does not share Oliver's race, but shares the race of the victim; Felicia Thomas Lynn, a black woman who shares Oliver's race; and Aparna R. Talwalker, a woman of Asian descent, who does not share the race of Oliver or that of the victim.

¶9 Vega told the prosecutor that her brother was in prison. "[S]triking an African-American juror because of a familial relationship to individuals involved in the criminal justice system is a neutral reason to strike a juror." ***State v. Lamon***, 2003 WI 78, ¶81, 262 Wis. 2d 747, 664 N.W.2d 607 (citation omitted).

¶10 Lynn was a MILWAUKEE JOURNAL SENTINEL reporter who reports on urban affairs on the north and central city areas of Milwaukee and also covers the police beat. The prosecutor asked Lynn if there was anything about her professional experience that would compromise her impartiality in serving as a juror. Lynn responded that "[i]t's actually difficult getting information [for the newspaper from the police department]." The prosecutor then explained that it was the police department's responsibility to keep certain information from the press while it was investigating a case, to which Lynn responded that it was the press's obligation to report that information to the public. Lynn commented that the police department refused to disclose information to the press when she did not

believe it was necessary to maintain confidentiality. When the prosecutor asked Lynn if her professional experiences as a reporter who sometimes had a difficult relationship with the police department would result in her "hold[ing] it against the State," Lynn responded "[a]t this time, I would say no."

¶11 Lynn's difficulty with the police department stemmed from her profession, not from her race. The record demonstrated that the prosecutor's decision to strike a police beat reporter attempting to obtain often sensitive information from the police department while it was in the midst of investigations often facilitated by or dependent upon confidentiality exposed the understandable tension inherent in the relationship between the police and the press: a race-neutral reason. Oliver has not shown that the prosecutor's striking Lynn was because of her race.

¶12 Talwalker, an Asian woman, stated that she was single, and was an English composition instructor at the University of Wisconsin-Milwaukee. Neither Oliver nor the victim shared Talwalker's race. Here, Oliver has made a prima facie showing that the prosecutor's striking of Talwalker was based on race. Because trial counsel did not raise a ***Batson*** objection, the prosecutor was not afforded the opportunity to articulate the reason for striking that prospective juror; consequently, there is nothing in the record to indicate if there was a race-neutral reason for this peremptory strike.

¶13 Without that record, we now must determine whether Oliver has carried his burden of proving purposeful discrimination. *See* ***Lopez***, 173 Wis. 2d at 728 (citation omitted). The absence of a record renders it difficult to determine whether Oliver has shown that the prosecutor was "motivated in substantial part

by discriminatory intent," and whether he has shown "purposeful discrimination." *See* ***Snyder v. Louisiana***, 552 U.S. 472, 485 (2008).

¶14 In this instance of the peremptory strike against Talwalker, the ineffective assistance claim where we have no objection and therefore no record to review, compels us to examine the prejudice prong of ineffective assistance, namely whether Oliver has shown, in addition to deficient performance, "a reasonable probability that, but for counsel's unprofessional errors[, the failure to pursue trial counsel's waiver of a ***Batson*** objection], the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Oliver is unable to demonstrate prejudice, in that:

> [W]e can do no better than speculate on what would have been the result if [Oliver]'s counsel had used his peremptory strikes differently. Because [Oliver] cannot demonstrate that he was prejudiced by how counsel chose to use [his] peremptory strikes, we conclude [Oliver] was not denied the effective assistance of counsel.

State v. Nielsen, 2001 WI App 192, ¶27, 247 Wis. 2d 466, 634 N.W.2d 325. Oliver has not shown "a 'reasonable probability' that [a ***Batson*** objection] would have been sustained." ***Taylor***, 272 Wis. 2d 642, ¶17.

¶15 Two other prospective black jurors were also stricken: one for cause by the trial court, the other by Oliver, leaving an all-white jury. Both the prosecutor and defense counsel agreed that Tammy R. Williams should be stricken

for cause.[4] The other prospective black juror, Joe N. Reed, was stricken by the defense.

¶16 Postconviction counsel testified that he considered an ineffective assistance claim on the basis of ***Batson***, but his review demonstrated that a ***Batson*** challenge "wasn't supported by the law." Our analysis of the three prospective jurors peremptorily stricken by the prosecutor is consistent with postconviction counsel's expressed assessment.

¶17 The remaining issue is whether postconviction counsel was ineffective for failing to challenge trial counsel's waiving an objection to the trial court's *ex parte* communications with the jury during deliberations. Neither the prosecutor nor defense counsel objected to those *ex parte* communications. Oliver raised these claims of error with his postconviction counsel who testified that he did not pursue them because "[t]here is no indication whatsoever that the jury was misled. To me, their questions to the Court meant that they were seriously reviewing the facts and the law that they were ordered to apply." These communications, in postconviction counsel's opinion, were "[a]t the most" harmless error.

¶18 The single communication Oliver challenged in this appeal was described by the trial court to counsel as the jury asking the trial court, "[c]an the

[4] Williams was stricken for cause because she described numerous incidents where she and her family members had been the victims of crime by black perpetrators. Williams recounted that she lives in the vicinity of where this alleged crime occurred and was the target of a failed robbery and a break-in to her home. She said that she was uncomfortable about Oliver's case, and that her experiences would affect her ability to be fair and impartial. When asked to explain, she responded that she could not put aside those feelings "because I am very disappointed in my race, if that's what it is, our young generation."

charges be ruled on separately; one, the Attempted Armed robbery; two, or the charge, the murder charge or reduce the murder charge to manslaughter?" The trial court told counsel that "[t]he answer that I gave to them is the charge is one count of Felony Murder as contained in the information. I referred them to instruction 110, and then some time after that, I was informed that they had a verdict." Neither counsel objected.

¶19

> Unless a defendant has waived his or her rights, a trial court's communication with a deliberating jury in the absence of the defendant and defendant's counsel violates the defendant's constitutional right to be present at trial and to have counsel at every stage where he or she needs aid in dealing with legal problems. When a trial court commits this type of violation, the error is subject to harmless error analysis. We examine the circumstances and substance of the communication in light of the entire trial to determine whether the error was harmless. An error is harmless if there is no reasonable possibility that the error affected the outcome of the trial.

State v. Koller, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted).

¶20 It is undisputed that the trial court's communication with the deliberating jury was outside the presence of counsel and Oliver. This was error. *See* ***State v. Burton***, 112 Wis. 2d 560, 570, 334 N.W.2d 263 (1983). "To assess the impact of this error, we must take into account the circumstances under which the judge made the erroneous communication and the substance of the judge's communication in light of the entire trial." ***Id.*** at 571. We therefore examine whether the trial court's communication was "simple, neutral and to the point – and … [whether] it was legally correct." ***State v. Bjerkaas***, 163 Wis. 2d 949, 959, 472 N.W.2d 615 (Ct. App. 1991).

¶21 Responding to the inquiry that "Felony Murder as contained in the information," and referring the jury to WIS JI—CRIMINAL 110 **One Defendant: Single Count: No Included Offense** that requires the trial court to read the charge from the information to the jury was "simple, neutral and to the point … and … legally correct." ***Bjerkaas***, 163 Wis. 2d at 959. The trial court did not answer the jury's question; it merely referred the jury to the instruction. Its response was neutral and legally correct.

¶22 Oliver contends, however, that had he been aware of the jury's thinking, he could have "confront[ed] the jury when they and the judge had these communications." He does not specify what he would have "confront[ed] the jury" with, or how the trial court's reference was prejudicial except to contend that it was "confus[ing]." Oliver suggests that had he and his counsel been present during this communication they could have lessened the confusion by asking the trial court to ask the jurors "if they clearly understood the charge of Felony Murder and [the trial court could have] explain[ed] to them …." What Oliver suggests is contrary to ***Bjerkaas***'s analysis. *See* ***id.*** at 958-59. The case had been tried; the jury had been instructed and had begun to deliberate. The time for explanations and elaborations was prior to, not during, deliberations. Oliver has not shown that waiving his objection to the *ex parte* communication constituted reversible error.

¶23 Oliver has not shown that his postconviction counsel was ineffective for failing to pursue trial counsel's failures to raise a ***Batson*** objection or to object to the trial court's *ex parte* communication with the deliberating jury. Oliver has not shown the validity of a ***Batson*** objection. Oliver has shown only harmless error regarding the *ex parte* communication, which is insufficient to establish the prejudice necessary to maintain an ineffective assistance claim. *See* ***Strickland***,

466 U.S. at 694. The two issues Oliver identifies have been shown as weak ineffective assistance claims against trial counsel; they are further compromised as ineffective assistance claims against postconviction counsel for failing to select these potential issues to pursue on appeal. Oliver fails both to overcome ***Escalona***'s procedural bar and to likewise demonstrate an ineffective assistance claim against postconviction counsel.

By the Court.—Order affirmed.

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