STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1575 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLIFTON ROBINSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS P. MORONEY PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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AUTHORITIES CITED

ARGUMENT

I. THE DEFENDANT MET THE CRITERIA SET FORTH IN STATE V. LAMON IN ASSERTING THE BATSON CHALLENGE.

The defendant maintains that a "prima facie" inference exists where a prosecutor chooses to exercise his peremptory challenge removing the ***only*** remaining potential juror whom is a member of a cognizable group. That circumstance, standing alone, establishes a presumption that the State has challenged a juror solely on the basis of their race or that it has assumed that black jurors as a group will be unable to consider the State's case against a black defendant in accordance with Batson v. Kentucky, 476 U.S. 79, 89 (1986). In any event, the trial court must have determined that a prima facie showing were made, because it proceeded to inquire further for a race-neutral explanation. "The Batson Court expressed "confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." State v. Lamon, 262 Wis. 2d. 747, ¶28 citing Batson, at 97, 106 S.Ct. 1712.

The State only now raises its challenge to the required prima facie showing. The defendant asserts that the State not only waived its challenge to the first prong of Lamon by not objecting at the trial court level but, it agreed to it by representing in its response to the defendant's post-conviction stating, "Rightfully, the court accepted that this was a prima facie showing and inquired of the prosecutor to provide reason." (47:5)

Under Lamon, "the second Batson step, a "neutral explanation" means an explanation based on something other than the race of the juror. Id. at 98, 106 S.Ct. 1712. Facial validity of the prosecutor's explanation is the issue. Unless discriminatory intent is inherent in the prosecutor's explanation, "the reason offered will be deemed race neutral." Lamon at ¶30 citing Hernandez v. New York, 500 U.S. 352 (1991) at 360.

The third step of Batson "requires that when 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. Batson, 476 U.S. at 98, 106 S.Ct. 1712. As part of this third step, a defendant may show that the reasons proffered by the State are pretexts for racial discrimination. State v. Walker, 154 Wis.2d 158, 176 n.

11, 453 N.W.2d 127 (1990). The defendant then has the ultimate burden of persuading the court that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination. Batson, 476 U.S. at 94 n. 18, 98, 106 S.Ct. 1712. Therefore, it is at this step that the issue of persuasiveness and plausibility of the prosecutor's reasons for the strike become relevant, and "implausible or fantastic justifications may [ ] be found to be pretexts for purposeful discrimination." Purkett, 514 U.S. at 768, 115 S.Ct. 1769." See Lamon at ¶32.

The heart of the defendant's argument relates to the second and third prongs wherein he has consistently contended in his post-conviction motion, in his reply to the State's Brief in Response to Defendant's Motion for Post-conviction relief and in his appellate brief that additional inquiry of the prosecutor is necessary to make these determinations. He has presented several questions that should be considered by the trial court in order to properly gauge the credibility of this claim and clarify the prosecutor's intention under these vague circumstances. Moreover, based upon the inadequacy of the record at hand, further inquiry of the prosecutor is needed to determine

"the persuasiveness and plausibility of the prosecutor's reasons for the strike..."

The problem with the State's representations in its brief that the "prosecutor was only seven or eight feet away from the juror and better positioned than the circuit court to determine whether juror 26 was paying attention," neither defense counsel nor, more importantly, the court observed the potential juror's demeanor or actions as they related to the prosecutor's account. This case is distinguishable from the facts in Lamon, where "[t]he circuit court judge . . . was in the best position to evaluate the level of [the prosecutor's] knowledge of information relating to the [juror], in combination with [the juror's] non-responsiveness to the general voir dire." Lamon at ¶54.

II. THE DEFENDANT PRESERVED HIS OBJECTION TO THE PROPOSED JURY INSTRUCTIONS SUBSTITUTING VICTIMS.

In its brief at page 14, the State represents that the "the circuit court substituted W.H.'s name for D.S.'s name in the substantive instructions for criminal damage to property and armed robbery (66:37-38)." The State further writes that "Robinson did not object to the substantive instructions at that time, or following closing arguments. (66:27-30, 70-71)." In its footnote on page 14, the State

asserts that "further in discussing the instructions, the prosecutor noted that the names in the armed robbery instructions would change (66:25). Robinson did not object and any objection would have been not have been successful."

The defendant maintains, and as a matter of clarification, that the defendant properly preserved his objection to the said name changes in the instructions. During the discussion about the proposed instructions where the court suggested referring to the counts as 1 and 2 rather than 2 and 3, the prosecutor stated, "[b]efore we give them that though, I have some changes, but it just has to do with I think we should identify Mr. Hines as the property owner. I think the evidence supports that, but --" (66:4:6-9)

Defense counsel interrupts the prosecutor by saying, "***I would object***." (66:4:10). The trial court then clarified, "that's the charging document, it says Deborah Sims. That's all I'm saying to you." (66:4:11-13). A brief exchange between the prosecutor and the court ensued regarding whether the names can be changed; based upon what evidence comes in at trial. The court then resumes the trial calling one remaining witness.

After the State rested, the defense moved the court for a directed verdict adding, "There is no testimony from Ms. Sims, who, as noted in the criminal complaint, is the person that my client is allegedly supposed to have stolen – taken the items from the presence of, ***and it's even mentioned by the court in its opening instructions*** relating to the crime of armed robbery." (66:11:16–22).

Defense counsel appears to try to object as well when the court is deliberating the concept of joint property by saying, "If I may judge. Sorry to interrupt," (66:14:13–14) and the Court replies "You've already had your say I think. Haven't you?" (66:14:15–16) Defense counsel replies, "I just wanted to say, if you look at element 1, it defines what owner of the property is and it's the person who has possession of the property." (66:14:17–20). The court thereafter makes its definitive finding on the issue ultimately saying, "So, as far as the first element, whether it be Deborah Sims or Walter Hines' property, I think it's kind of like Mox Nix, it doesn't make any difference." (66:16–17). The court also concludes as to instruction 1400, criminal damage to property, that "the property belonged to another person, in this case the building, and certainly under the possession then of Mr. Hines." (66:20:12–15). In concluding, the trial court

states, "As to both counts, the Court will deny the motion for a directed verdict." (66:20:24-25).

The record unmistakably represents that counsel did, in fact, object and that he did so in a timely fashion; which was contemporaneously made with the court's determination on the issue of whether Mr. Hines name can be substituted in the instructions for that of Ms. Sims.

III. THE DEFENDANT DID NOT WAIVE HIS APPELLATE RIGHTS TO CHALLENGE SEVERANCE OF THE CHARGES AND IS ENTITLED TO SAME.

The defendant acknowledges that the defendant did not move for joinder at the trial level, but appellate counsel did allege ineffective assistance of counsel in his post-conviction motion on this issue, thereby preserving his appellate rights to raise the joinder and severance issue on appeal. Unfortunately, the court did not grant the defendant an opportunity to question counsel regarding his reasons for same in the form of a post-conviction hearing per the defendant's request in said motion.

IV. THE DEFENDANT DID NOT WAIVE HIS APPELLATE RIGHTS IN REQUESTING LESSER INCLUDED OFFENSES AND IS ENTITLED TO SAME.

The defendant acknowledges that the defendant did not request a lesser included jury instruction, but appellate counsel did allege ineffective assistance of counsel in his post-conviction motion on this issue, thereby preserving his appellate rights to raise on appeal the issue that a lesser included was appropriate, that the defendant sought one, and defense counsel should have, but failed to request same. Unfortunately, the court did not grant the defendant an opportunity to question counsel regarding his reasons for not having requested the lesser included jury instructions in the form of a post-conviction hearing per the defendant's request in said motion.

On this issue, the State on page 23 of its brief argues that Robinson's argument fails to reference any evidence within the trial record that would have supported a request for a lesser included jury instruction. Thereby under State v. Lass, invites this Court should take the path of least resistance and not consider the defendant's argument. The defendant invites this Court (after contemplating the reasons for which he was denied the right to a post-conviction hearing, where he should have been

permitted to ask his trial counsel relevant questions regarding his failure to act) to read the defendant's post-conviction motion and brief, particularly at pages 18-19. Ample reasons were stated therein from which this Court can conclude that the record supports the proposition for lesser included offenses.

V. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AND THE DEFENDANT PRESERVED HIS RIGHTS TO RAISE SAID CHALLENGES.

The defendant in replying to the State's brief on the multiple issues of ineffective assistance of counsel reinforces that he maintains he was improperly denied the right to a post-conviction or Machner hearing. First, the defendant preserved his appellate rights by asserting that trial counsel was ineffective on the related issues alleged; second, a Machner hearing is necessary in order to adequately develop each and every claim asserted by questioning trial counsel in order to draw the proper legal conclusions, rather than making presumptions, as the State has, without an established record (ie., the State's conclusions regarding the defendant's strategies and his best defense – see pages 31-32 of State's brief); and third, the trial court did not provide a sufficient record

demonstrating why it denied the defendant's post-conviction motion and his request for a hearing on these related issues. The trial court concluding only that "there is nothing counsel did or did not do that prejudiced the outcome of the trial in this case." (51:3). The defendant respectfully argues that such a record is deficient for the Court to make these determinations without a Machner hearing.

Finally, with regard to the State's insinuation that the testimony of Detective Wallich may constitute hearsay (State's brief at page 32), the defendant maintains that hearsay exceptions would distinctively apply under either Wis. Stats. Sec. §908.03(2): Excited Utterance or Wis. Stats Sec. §908.03(24): Other Exceptions.

Excited Utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Other Exceptions is "a statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

Under either exception, the record appears to be clear that Ms. Sims was present at the alleged incident, her demeanor was observable, and she may very well have been

interviewed by Detective Wallich. So, any statements, if provided, would qualify under the excited utterance statute given the nature of the crime, the alleged events having taken place in the record and the contemporaneousness of police contact.

For similar reasons, under Other Exceptions, the independent observations and investigation conducted by Detective Wallich immediately after the incident would establish "comparable circumstantial guarantees of trustworthiness." To bolster this claim, it is noteworthy that Detective Wallich also testified that during the incident Ms. Sims was injured in the course of this crime, having been attacked and assaulted by two of the co-actors. (15:9:11-13).

CONCLUSION

For the reasons stated, the defendant-appellant, Clifton Robinson, by his attorney, Jon Alfonso Lamendola, prays that this court will reverse the jury's guilty findings and vacate the judgments of conviction, directing the trial court to enter judgments of acquittal. It is further requested that this Court reverse the trial court's Decision and Order denying the defendant's motion for post-

conviction motion without a hearing and vacate the judgments of conviction; or alternatively, remand this matter for further proceedings with directives on which issues the defendant is entitled to a post-conviction hearing.

Dated this 15th day of December, 2014.

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CERTIFICATION

I certify that this Brief meets the form and length requirements of Appellate Procedure for a document printed in monospaced format. This brief is twelve pages in length.

Dated this 15th day of December, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 15th day of December, 2014.

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