STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP783-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL EXHAVIER DUNN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM POCAN, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF,THE HONORABLE DAVID A. HANSHER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

STATEMENT OF THE FACTS 2

ARGUMENT 13

I. Dunn is due no relief on his claim that Milwaukee County's jury selection process systematically fails to result in a fair and reasonable number of African-American and Hispanic people summoned for jury duty. 13

A. Standard of review 14

B. Relevant law 15

C. Dunn has not made a prima facie showing that Milwaukee County's jury pool violates the fair cross section requirement. 16

1. Using the DOT lists results in a fair and reasonable proportion of African-American and Hispanic jurors on the prospective juror list in relation to their proportion in the community. 17

2. Dunn has conflated the fair and reasonable representation analysis with the systematic exclusion analysis, and consequently cannot meet either element of the test. 21

Page

II. Dunn's *Batson* claim is forfeited and fails on the merits. 23

A. Dunn failed to raise his equal protection claim based on *Batson v. Kentucky* at trial and has therefore forfeited the claim. 23

B. Dunn's claim that the prosecutor acted with racially discriminatory intent when he struck two African-American jurors fails on the merits. 25

1. Standard of review 25

2. Relevant law 25

3. Dunn did not establish a prima facie case of purposeful discrimination. 27

4. The trial court's finding that the prosecutor's race neutral reasons for striking those jurors was not clearly erroneous. 28

III. The facts alleged in Dunn's postconviction motion did not establish that counsel's failure to cross-examine Ganske was deficient or prejudicial, thus the circuit court properly denied his ineffective assistance claim without a hearing. 32

A. Standard of review 32

B. Relevant law 32

C. Counsel's failure to cross examine Ganske about her level of certainty in identifying her Ford Explorer and Dunn on the surveillance video was not deficient performance. 34

Page

D. There is not a reasonable probability that cross-examining Ganske about her identification would have caused the jury to have a reasonable doubt about Dunn's guilt. 35

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky,
476 U.S. 79 (1986) ..... 4, *passim*

Berghuis v. Smith,
559 U.S. 314 (2010) 18

Duren v. Missouri,
439 U.S. 357 (1979) 15, 17, 21, 22

Hernandez v. New York,
500 U.S. 352 (1991) 27

Johnson v. McCaughtry,
92 F.3d 585 (7th Cir. 1996) 21

Lockhart v. McCree,
476 U.S. 162 (1986) 16

McKissick v. State,
49 Wis. 2d 537, 182 N.W.2d 282 (1971) 16

State v. Allen,
2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 ... 32, 33, 34

State v. Balliette,
2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334 33

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996) 15, 33

State v. Domke,
2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364 33

Page

State v. Felix,
2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775 28

State v. Felton,
110 Wis. 2d 485, 329 N.W.2d 161 (1983) 34

State v. Horton,
151 Wis. 2d 250, 445 N.W.2d 46 (Ct. App. 1989)..... 16

State v. Huebner,
2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727..... 23

State v. Lamon,
2003 WI 78, 262 Wis. 2d 747,
664 N.W.2d 607 ..... 26, 27, 28, 31

State v. Lopez,
173 Wis. 2d 724, 496 N.W.2d 617 (1992) 25

State v. Phillips,
2009 WI App 179, 322 Wis. 2d 576, 778 N.W.2d 157..... 32

State v. Pruitt,
95 Wis. 2d 69, 289 N.W.2d 343
(Ct. App. 1980)..... 15, 16, 21, 22

State v. Rogers,
196 Wis. 2d 817, 539 N.W.2d 897 (1995) 23

State v. Sholar,
2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89..... 36

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305..... 33

State v. Walker,
154 Wis. 2d 158, 453 N.W.2d 127 (1990) 28

Strickland v. Washington,
466 U.S. 668 (1984) 32, 33, 35, 36

Swain v. Alabama,
380 U.S. 202 (1965) 15

Taylor v. Louisiana,
419 U.S. 522 (1975) 15, 16

Page

United States v. Sanchez-Lopez,
879 F.2d 541 (1989) 14

United States v. McAnderson,
914 F.2d 943 (7th Cir. 1990) 15, 21, 22

Wirth v. Ehly,
93 Wis. 2d 433, 287 N.W.2d 140 (1980) 14, 25

Zeller v. Northrup King Co.,
125 Wis. 2d 31, 370 N.W.2d 809 (1985) 23

Constitutional Provisions

U.S. Const. amend. VI 32

U.S. Const. amend. XIV 32

Wis. Const. art. I, § 7 32

Statutes

Wis. Stat. § 756.02 18

Wis. Stat. § 756.04 ..... 14, 17, 18

Wis. Stat. § 756.04(2)(a) 13

Wis. Stat. § 756.04(2)(b) 13

Wis. Stat. § 756.04(2)(c) 13

Wis. Stat. § 756.04(3m) 13

Wis. Stat. § 756.04(6)(am) 13

Wis. Stat. § 756.04(9) 13

Wis. Stat. § 756.04(9)(a) 13

ISSUES PRESENTED

1. Did the use of Department of Transportation list of licensed drivers and state I.D. card holders deprive Dunn of his constitutional right to a jury pool drawn from a fair cross section of the community?

The postconviction court denied this claim without a hearing.

This Court should affirm the circuit court.

2. Did Dunn prove that the prosecutor's use of peremptory strikes to remove two African-American jurors was done for a racially discriminatory purpose?

The trial court answered no.

This Court should affirm the trial court.

3. Did Dunn plead sufficient facts to warrant a hearing on his claim that counsel was ineffective for failing to cross-examine Dunn's ex-girlfriend about her ability to identify him and her own car on a surveillance video?

The postconviction court answered no.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Dunn's own evidence shows that African-American and Hispanic representation in the prospective Milwaukee County jury pool is fair and reasonable in relation to the number of African-American and Hispanic people in the community. Even if the numbers Dunn has provided from a 2007 study can be reliably extrapolated to today, his claim

fails. Dunn has shown disparities of only 7.3% between the percentage of the African-American population eligible for jury service and the percentage of African-American jurors actually sworn on juries, and only 3.1% between the percentage of the Hispanic population eligible and actually sworn on juries. That is far below the percentage disparities that this Court, the Seventh Circuit, and the United States Supreme Court have found "fair and reasonable" representation of a particular group in relation to their proportion in the community.

Dunn's *Batson* challenge is forfeited but also meritless. Dunn did not raise a *Batson* challenge in the trial court; he claimed that his jury did not mirror the racial makeup of Milwaukee County. Nevertheless, the prosecutor gave sufficient race-neutral reasons for striking two African-American jurors, and the trial court found that Dunn had not sufficiently shown a *Batson* violation. That finding was not clearly erroneous.

Finally, the circuit court properly denied Dunn's ineffective assistance of counsel claim without a *Machner* hearing. Dunn failed to show that his attorney performed deficiently by failing to cross examine a witness about her identification of Dunn and of her car, and there is not a reasonable probability that the jury would have reached a different result if he had.

STATEMENT OF THE FACTS

The Crime

On April 3, 2015, Officer Paul Taylor of the West Allis police department responded to a store called Vape 108 to investigate a robbery complaint. (R. 1:1.) When Taylor arrived he spoke with the victim, V.S., who was battered, bleeding, and wearing only a hoodie and his boxer shorts. (R. 1:1.) V.S. told Taylor that he attempted to hire a prostitute he found on

Backpage.com named "Anna." (R. 1:2.) They negotiated a price and agreed to meet at the Days Inn in West Allis. (R. 1:2.) "Anna" led him to room 228. (R. 1:2.) Once they arrived there and got undressed, two black men came out of the bathroom and beat V.S. until he fell to the ground. (R. 1:2.) "Anna" and the two men stole his wallet, phone, and pants, and ran from the room. (R. 1:2.) V.S. cleaned his bloody face and walked to Vape 108, where the police were called. (R. 1:2.)

Police obtained surveillance video from the Days Inn and learned the license plate number of the car the assailants were driving, a red Ford Explorer, from some witnesses. (R. 1:2.) Police stopped the car the next day and found all three assailants, Sarah Parker ("Anna"), Austin Cooper, and Michael Dunn, inside. (R. 1:3.) V.S. activated the "find my phone" feature and GPS pinpointed it at Dunn's mother's house. (R. 1:2.) The State charged Dunn with one count of robbery with the use of force as a party to a crime. (R. 1:1.) Dunn pled not guilty and the case proceeded to trial, where Dunn was represented by Attorney Frederick Klimetz. (R. 67:16.)

Dunn's Challenge to the Racial Composition of the Jury

The morning of trial, the court began by noting that the normal jury venire is thirty jurors and asking if that was acceptable. (R. 75:5.) Both parties agreed that was an acceptable number. (R. 75:5.) Klimetz told the court, however, that "last time I had a jury trial, Judge, the number of African-Americans on the panel was greatly underrepresented. I just want to advise the Court that if that happens today I may bring that motion again." (R. 75:19.) The court responded:

> Well, you may but I don't know what kind of a challenge you would bring because of course it's not to the thirty people that are brought here. It's the people that are called by Milwaukee County. And quite frankly, I doubt that you've got the data to challenge

> that. My information is that they're very careful about calling in a cross-section of the community. . . . But we'll see if and when it is raised, we'll certainly address any objection or request you have.

(R. 75:19.)

After seeing the venire, Klimetz noted that only three of the 30 prospective jurors appeared to be of African-American descent. (R. 76:8.) He objected to the composition of the venire on the ground that it was unlikely to produce a petit jury with a racial makeup that was proportional to Milwaukee County. (R. 76:7.)

Using figures from the Wisconsin Blue Book, 2015–16, Klimetz noted that African-American, voting age Milwaukee County residents accounted for roughly 23.6 percent of the county's population. (R. 76:7–8.) Klimetz argued:

> Your Honor . . . I acknowledge that I don't have enough to meet the standards of the *Batson v. Kentucky* case which dealt with a case where the county in that particular matter used an improper method for selecting jurors,[1] a method that resulted in under-representation by minorities.
>
> And I don't have the statistics or the numbers, et cetera, to do that.
>
> But I do think that the Court has an inherent authority to assure that any defendant including this defendant that he gets a fair trial . . . of his peers.
>
> And that in a panel where only ten percent of the possible jurors are of African-American descent, that does not represent a fair trial and does not represent a fair cross-section of Milwaukee County.

(R. 76:9.)

---

[1] On appeal, Dunn acknowledges that trial counsel inaccurately described the challenge as one pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (Dunn's Br. 3–4 n.1.)

The court found that the challenge to the composition of the potential petit jury was premature, and advised that the court would revisit it if Klimetz re-raised the challenge after the jury was empaneled. (R. 76:10–11.) One African-American juror remained after the jury was empaneled; the State used preemptory strikes to remove the two other potential African-American jurors. (R. 76:159–60.)

Klimetz renewed his challenge. (R. 76:159.) He noted that the State struck two of the three potential African-American jurors, and one African-American juror out of fourteen amounted to a petit jury that was 7% African-American, when the population of Milwaukee County was 23.6% African-American. (R. 76:159–60.) He argued "[t]hat is far short of being a truly representative panel." (R. 76:160.) Klimetz again acknowledged that he did not have grounds to challenge the process by which jurors were summoned "at this point" because he was unsure how Milwaukee County picked the prospective juror pool. (R. 76:160.) He maintained, however, that the Court could exercise its inherent authority "to make sure" Dunn had a representative jury panel. (R. 76:160.) He asked the court to strike the panel and choose a new jury. (R. 76:161.)

The State opposed Klimetz challenge on the ground that Dunn was not entitled to have a specific number of African-Americans on the jury. (R. 76:162.) The prosecutor also explained that he struck one of the African-American jurors because she was asleep, and the other because she worked third-shift. (R. 76:162.) The prosecutor said, in general, he strikes anyone who works third shift. (R. 76:162.)

The court concluded that "there's not a basis here to -- certainly, not under *Batson*. But I don't think that based on what I've heard here and what I've seen here that there's any reason based on equity or other grounds to strike this jury panel. And, so, we are going to proceed." (R. 76:165.)

The Trial and Sentencing

At trial, the State first called V.S. (R. 77:8–9.) He testified about hiring "Anna" and subsequently being jumped, robbed, and beaten at the Days Inn. (R. 77:9–21.) V.S. said he was afraid and ashamed to call the police, but he realized that he could not walk all the way home and decided to seek help at a nearby store. (R. 77:22–24.) A person inside the store called the police. (R. 77:24–25.) V.S. cooperated with the police when they arrived; he gave a statement and allowed the police to take pictures of his injuries. (R. 77:26–32, 41–43.)

V.S. testified that his cell phone had a tracking feature that allowed the phone to be located through GPS. (R. 77:31.) He logged into the tracking website and a few days after the robbery the website showed the location of his phone. (R. 77:33–34.) He immediately called Detective Dan DiTorrice and left a voicemail telling him where the phone was located. (R. 77:34.)

V.S. explained that he could not identify either of the two men who attacked him because he was attacked from behind and the assailants' hoods on their sweatshirts were up. (R. 77:48–49, 55.) He could, however, identify "Anna." When shown a picture of Sarah Parker, he identified her as the woman he knew as "Anna." (R. 78:70.)

Officer Paul Taylor testified that he and Officer Lucas Binter went to the Days Inn to investigate. (R. 77:75–76.) They brought V.S. with them and he led the officers to room 228. (R. 77:76.) The hotel manager gave the officers a key. (R. 77:77.) In the room, they found two receipts for the room with the name Austin Cooper on them. (R. 77:78–79.) Binter testified that based on past experience he knew that the Days Inn "has good video all the way around the building" and he asked that the manager retrieve any video footage that could be related to the robbery. (R. 78:17–18.) While the manager was loading the video, Binter talked to two people who

believed they witnessed part of the incident. (R. 78:18.) Those witnesses gave Binter a license plate number. (R. 78:18–19.)

The hotel manager provided Binter with video from multiple cameras, which was played for the jury. (R. 78:17, 30–37.) The video from an exterior camera showed a red Ford Explorer enter the Days Inn parking lot. (R. 78:37.) Three people, a white woman and two black men, walked through the parking lot and in the north entrance of the hotel. (R. 78:28–29, 32–33.) Video from an interior hallway camera showed the same three people entering room 228. (R. 78:34, 41.) A short time later the woman left the room and returned with V.S. (R. 78:34, 42.) After a few more minutes, the woman and the two black men rushed out of the room to the north-side exit. (R. 78:34–35, 43.) The woman and one of the men were carrying some clothing. (R. 78:33, 39, 43.) The video from the exterior camera showed the three ran toward the red Ford Explorer, and the Explorer driving away. (R. 78:28–29, 32, 44.)

Binter testified that he called dispatch, described the Ford Explorer, and ran the license plate number. (R. 78:47–48.) The next day, Greendale police stopped the car and identified the occupants as Sarah Parker, Austin Cooper, and Michael Dunn. (R. 78:48–50, 57.) Police found Dunn's ID card and a sweatshirt worn by one of the men during the robbery in the Explorer. (R. 78:54–56.) They learned the owner of the Explorer was Dana Ganske. (R. 78:56.)

Ganske testified that in April of 2015, she was the primary driver of the Explorer. (R. 78:83–84.) She identified Dunn in court as someone she had known since middle school and had been dating for seven months on the date of the robbery, but they had since broken up. (R. 78:84–85.) She said that on April 3, 2015, Dunn asked to borrow the Explorer around 2:00 or 3:00 pm. (R. 78:90.) It was typical for Dunn to borrow the car, and she agreed he could use it if he first dropped her off at her mother's house. (R. 78:90.) Dunn

dropped Ganske off at her mother's at 3:00 pm and, apart from some short texts, she did not hear from him again until 11:00 pm, which was unusual. (R. 78:91–92.) Ganske testified that when Dunn returned, he told her he had been at a friend's house. (R. 78:92.) The next day, Dunn told Ganske that if the police came, she should tell them she had the Explorer the night before. (R. 78:93.)

Ganske testified that the police came to her house the next day and asked about the Explorer. (R. 78:94–95.) She told them she had the car the whole day, but that was a lie. (R. 78:95.) She lied because she did not want Dunn to get in trouble. (R. 78:95.) She testified that the police called her on April 4th, while she was at work, and notified her that they had custody of the Explorer. (R. 78:96–97.) Two months later, she was arrested and taken to the West Allis police station. (R. 78:103.) There, the police told her that she could be charged with a crime for harboring and aiding a felon and lose custody of her child if she did not cooperate with their investigation. (R. 78:104–06.) The police showed her the surveillance video from the Days Inn, and she identified Dunn in the video. (R. 78:97.) She recognized the other two people, but did not really know them. (R. 78:97–98.) She also identified the Explorer on the surveillance video as her car. (R. 78:98–99.) The State played the video for Ganske and she confirmed that the Explorer on the video was her car. (R. 78:98–99.) She also pointed to Dunn on the video. (R. 78:99.) When asked how she knew it was him, she said she recognized his walk, his shoes, and his pants. (R. 78:99.) When asked how she recognized those things, she testified that she had bought Dunn the clothes he was wearing in the video, and had known him for nine or ten years. (R. 78:99–100.)

On cross-examination the defense brought forth that Ganske originally told police she did not want to get involved, and did not do so until she was arrested and afraid that she would lose custody of her child. (R. 78:107, 109–114; 133–34.)

Detective DiTorrice testified and confirmed that he told Ganske that there would be consequences for lying. (R. 78:133.) On cross-examination, DiTorrice said that he went to Ganske's home "in hopes of her giving me information before it got to [the point where he had to arrest her]." (R. 78:134.) When he arrived, Ganske asked the detectives to leave the house. (R. 78:140.) It was then that he told her she was under arrest for aiding and abetting and that he knew she lied about having the Explorer on the day of the robbery. (R. 78:137, 146.)

Detective Nick Stachula testified that a few days after the robbery, DiTorrice dispatched him to an address on West Mitchell Street to look for V.S.'s phone. (R. 78:119–20.) The address was Dunn's mother's home. (R. 78:120.) Dunn's mother consented to a search of the home, and Stachula found V.S.'s phone in a laundry basket tucked between some men's clothes. (R. 78:122–25.)

The State then rested. (R. 78:150.)

Dunn did not testify, and the defense did not call any witnesses. (R. 78:158–61.)

In closing, the State argued:

> [t]he fight in this case is about who are those three people, and really, it's only about Michael Dunn. . . . Because we know who these people are. This is the prostitute. This is Anna. Her real name is Sarah Parker. This is the guy who bought the room. This is Austin Cooper. This is the guy who left his receipt, so we know who that guy is.
>
> What we don't know or what we didn't know before the evidence started is who is the third guy. . . . But now that you heard all the evidence you know who the third guy is. The third guy is . . . Michael Dunn.

(R. 79:26–27.)

The State pointed out all of the evidence implicating Dunn, including the testimony of Dana Ganske, the surveillance video, Dunn being arrested with Parker and Cooper the next day in the same red Ford Explorer as the one in the video, his ID being found in the Explorer, and V.S.'s phone being found in Dunn's mother's home. (R. 79:31–32.)

The defense argued that none of the State's witnesses gave reliable testimony implicating Dunn. (R. 79:36.) V.S. admitted lying to police about contacting "Anna" for prostitution before the day he was beaten. (R. 79:36–37.) The officers did not take DNA or fingerprints from the hotel room and had nothing physically linking Dunn to the crime scene. (R. 79:40–41.) The defense argued that "really, the State's case rises and falls on the statements of Dana Ganske, who admitted that she has broken up with Michael Dunn, admits that she doesn't have a relationship with him anymore." (R. 79:41.) The defense argued that she says now that she lied to police, but "[t]he question is really, when did she lie? Which time did she lie?" (R. 78:41.) The defense reminded the jury that Ganske changed her story and implicated Dunn only after DiTorrice arrested her, told her she would be charged with a felony, and would lose custody of her child. (R. 79:41–42.)

During deliberations, the jury asked to see the surveillance video again. (R. 79:56–57.) The jurors were returned to the courtroom and shown the video. (R. 79:61–62.) The jury found Dunn guilty of robbery by use of force as a party to a crime. (R. 79:64.) The court sentenced him to eight years of initial confinement and four years of extended supervision. (R. 82:44.)

Postconviction Proceedings

Dunn filed a postconviction motion raising two claims. First, he claimed his trial counsel was ineffective for failing to cross-examine Ganske about her identification of Dunn and

the Explorer on the surveillance video. (R. 51:1.) Second, he claimed that he was due a new trial because he was "deprived of the constitutional right to be tried in front of a jury made up of a fair cross-section of the community." (R. 51:1.)

Dunn argued that Attorney Klimetz performed deficiently because he "focused on undermining Ganske's credibility by discussing her motivation to lie." (R. 51:8.) He acknowledged that "attacking Ganske's motivation to lie to protect her child was an important strategy," but claimed that counsel was also constitutionally required to cross-examine Ganske about the reliability of her identification of her Ford Explorer and of Dunn on the surveillance video. (R. 51:8–9.) Dunn argued that counsel "should have probed Ganske's certainty about the vehicle in the video belonging to her," and "asked how Ganske was so certain" that she bought the clothes she identified in the video. (R. 51:9.) He admitted that Ganske "was undoubtedly familiar with Mr. Dunn and with her vehicle," but claimed he was prejudiced because "[h]ad counsel cross examined Ganske about her confidence in her identification testimony, he could have further eroded the jury's belief in her credibility." (R. 51:10.) Therefore, he claimed, there was a reasonable probability that had counsel done so the jury would have found Dunn not guilty. (R. 51:11.)

As to his fair cross-section claim, Dunn argued that Milwaukee County's "exclusive use of department of transportation lists" to create the qualified juror pool deprived him of his right to a jury drawn from a representative cross-section of the community. (R. 51:11.) He claimed that pulling names from the list of people who have been issued a driver's license or state I.D. card resulted in underrepresentation of African-American and Hispanic residents because a larger percentage of African-American and Hispanic residents than white residents did not have one of these forms of I.D. (R. 51:11.) He claimed that therefore, once age, proficiency in English, lack of a felony conviction, and persons who have

been granted a deferral or are excused on request are accounted for, the percentage of prospective African-American and Hispanic prospective jurors is not fair and reasonable because it is lower than their percentage in the population. (R. 51:12–14.) The percentages all showed less than a ten percent disparity between the minority population of the county and the number of minorities summoned for jury service; nevertheless, Dunn claimed that "given the context of systemic exclusion," the method for composing the jury venire did not result in "fair and reasonable" representation of minorities. (R. 51:16–18.) In a footnote, he recognized that Attorney Klimetz may not have sufficiently preserved this claim, but if that were so, Klimetz was ineffective. (R. 51:18 n.7.)

The State argued that not cross-examining Ganske on the identification was sound trial strategy and could not be deficient performance. (R. 58:6.) It further argued that Dunn could not have been prejudiced in light of all of the other evidence presented against him. (R. 58:7.) The State argued that Dunn's fair cross-section claim based on Milwaukee County's system for summoning jurors was forfeited because Klimetz did not make that claim in the trial court. (R. 58:8.) Instead, "the record is clear that trial counsel was challenging the actual jury panel that was in front of him." (R. 58:8.) This was evident not only from counsel's objection, but from the remedy Dunn sought before trial: a new jury panel drawn from that system, not a new system. (R. 58:8–9.)

The circuit court denied Dunn's motion without a hearing. (R. 62.) It found that "even if deficient performance was a possibility, there was absolutely no probability of a different outcome" at trial. (R. 62:2.) This was so because "[r]egardless of how badly Dana Ganske might have been raked across the coals in cross-examination, one perplexing question would be foremost in everyone's mind: What was the victim's iPhone doing in the defendant's mother's laundry

basket???" (R. 62:2.) It therefore found no reason to hold a *Machner* hearing. (R. 62:2.)

Regarding the jury pool challenge, the circuit court implicitly accepted the State's argument that Dunn forfeited his fair cross-section claim. (R. 62:3.) The court noted that Attorney Klimetz made a specific objection to his particular jury pool, not the venire process. (R. 62:3.) The court reasoned that "postconviction counsel's more general objection to the jury selection process in Milwaukee County is not the proper subject of a postconviction motion here as the postconviction court does not have jurisdiction over Milwaukee County's jury selection process." (R. 62:3.) Dunn appeals.

ARGUMENT

I. Dunn is due no relief on his claim that Milwaukee County's jury selection process systematically fails to result in a fair and reasonable number of African-American and Hispanic people summoned for jury duty.

Wisconsin Stat. § 756.04(2)(a) and (b) require the office of the director of state courts to compile a master prospective jury list for each county using a list provided from the Department of Transportation ("DOT"). The director of state courts may supplement that list with other source lists identified in Wis. Stat. § 756.04(2)(c), but the clerk of each county circuit court is *statutorily required* to summon jurors using the list provided by the director of state courts. *See* Wis. Stat. § 756.04(3m), (6)(am), (9)(a). Milwaukee County, on its own, cannot supplement the prospective juror list. It can only strike from the list the names of persons that are not qualified for jury service. Wis. Stat. § 756.04(9).

Dunn appears to argue that *Milwaukee County* should be required to use sources other than the DOT list to compile its master prospective juror list, and its failure to do resulted in an unconstitutional prospective juror pool. (*See* Dunn's Br.

23.) Dunn is mistaken that the master prospective juror list was created by Milwaukee County, and he provides no evidence related to how the 2015 master list for Milwaukee County was compiled by the director of state courts.

There are multiple ways Dunn's fair cross-section claim fails. This Court could conclude that Dunn's claim, and requested relief of a new trial by a jury selected from a different master juror list, is only cognizable as a claim that Wis. Stat. § 756.04 is unconstitutional as applied to him because the statute mandates the process that he objects to. And, since that claim was not brought, the circuit court properly denied relief.

This Court could also conclude that Attorney Klimetz waived, on the record, any challenge to the method used to comprise master jury list. (*See* R. 76:160.) Or that he forfeited the claim by failing to present the trial court with the proper evidence to address it. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443–44, 287 N.W.2d 140, 145 (1980).

Ultimately, though, Dunn's challenge fails on the merits. Dunn's own evidence shows that use of the DOT list results in a proportional representation of African-American and Hispanic residents in the jury array. Consequently, regardless of whether this Court opts to apply any of these rules of judicial administration or to address the claim on the merits, it should conclude that the circuit court appropriately denied Dunn's claim without a hearing.

A. Standard of review

Whether the defendant established a prima facie violation of the fair cross section requirement is a question of law this Court reviews de novo. *United States v. Sanchez-Lopez*, 879 F.2d 541 (1989). Whether a defendant alleged sufficient facts in his postconviction motion to warrant an evidentiary hearing is likewise a question of law reviewed de

novo. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996).

B. Relevant law

The Sixth and Fourteenth Amendments to the United States Constitution grant a defendant the right to a "jury selected from a fair cross-section of the community." *Duren v. Missouri,* 439 U.S. 357, 359 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant must prove three elements. First, "the group alleged to be excluded is a 'distinctive' group in the community." *Duren,* 439 U.S. at 364. Second, "the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." *Id.* Third, he must show the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* If the defendant establishes a prima facie violation, the burden then shifts to the State to show "attainment of a fair cross section to be incompatible with a significant state interest." *Id.* at 368.

However, "[t]he jury pool need not be a statistical mirror of the community." *State v. Pruitt*, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980). Rather, "[t]he fair-cross-section requirement is met if [s]ubstantial representation of a distinctive group exists." *Id.* "As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation." *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990) (citing *Swain v. Alabama*, 380 U.S. 202 (1965) (*overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986)). Additionally, "[s]tates remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists

or panels are representative of the community." *Taylor*, 419 U.S. at 538.

A defendant does not have a right to a venire or a petit jury of any particular racial composition. *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986); *State v. Horton*, 151 Wis. 2d 250, 258–60, 445 N.W.2d 46 (Ct. App. 1989). A "lack of proportional representation of races on a jury panel does not constitute discrimination, and an accused is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." *McKissick v. State*, 49 Wis. 2d 537, 543, 182 N.W.2d 282 (1971) (footnote omitted). "[A] showing of disproportionate representation of a group on one jury array is not enough" to establish that "such underrepresentation is the result of a systematic exclusion of the group in the jury selection process." *Pruitt*, 95 Wis. 2d at 76.

C. Dunn has not made a prima facie showing that Milwaukee County's jury pool violates the fair cross section requirement.

The State does not dispute that African-American and Hispanic residents are distinctive racial groups in the community and therefore the first step of the *Duren* test is established. Nevertheless, Dunn's claim fails. First, Dunn has failed to show that the office of the director of state courts relied solely on the DOT lists to comprise the master jury list for Milwaukee County. But second, Dunn's own evidence shows that using the DOT lists to construct the prospective juror pool results in percentages of prospective jurors that closely match the racial composition of Milwaukee County. He therefore has failed to meet the second step of the test: showing that the proportion of African-American and Hispanic jurors in the prospective juror array is not fair and reasonable in relation to their proportion in the community. Consequently, he also cannot meet the third step of the test

and show that unfair and unreasonable representation of African-American and Hispanic jurors in the jury pool is due to systematic exclusion, because there is no unfair and unreasonable representation of African-American and Hispanic jurors in the pool.

Dunn claims that Milwaukee County "is still drawing solely from the Department of Transportation's list to compile their source list for the jury wheel from which jury pools are drawn." (Dunn's Br. 23.) He claims this is proven because the Milwaukee County Courts website contained a provision explaining that "The names used for our jury pool are obtained from the Wisconsin Department of Transportation list." (Dunn's Br. 17.) However, Milwaukee County does not compile their own source list. Wis. Stat. § 756.04. The office of the director of state courts compiles the master list, and only it has the discretionary authority to supplement the DOT list with other lists. Wis. Stat. § 756.04. Dunn has presented nothing showing what sources the director of state courts used to compile the master list used to select his jury venire. But assuming the director of state courts used only the DOT list, Dunn's claim still fails.

1. Using the DOT lists results in a fair and reasonable proportion of African-American and Hispanic jurors on the prospective juror list in relation to their proportion in the community.

In a fair cross-section challenge, the defendant typically must show that the percentage of the group *actually appearing* on jury venires is not fair and reasonable in relation to their proportion in the community. *Duren*, 439 U.S. at 364. Dunn has provided no information about the actual composition of Milwaukee County venires over a relevant time period—his only numbers are numbers of jurors *sworn*,

not potential jurors appearing in venires, and are from a 2007 report.[2] (Dunn's Br. 21–22; R-App. 101–68[3].)

Dunn's failure to provide the numbers of African-American and Hispanic residents that have actually appeared after being summoned means he did not present the circuit court or this Court with the proper data to assess absolute disparity or comparative disparity between the jurors on venires and the proportion of the group in the community. These measures are meant to compare how closely the percentage of the members of the group that were *actually present* on venires matches the percentage of the group in the local, jury eligible population. *Berghuis v. Smith*, 559 U.S. 314 (2010). To calculate absolute disparity, one subtracts the percentage of the group actually summoned from the percentage of the group in the local, jury eligible population. *Id.* To calculate comparative disparity, one divides the absolute disparity by the group's representation in the jury-eligible population. *Id*. The quotient shows how much more or less likely it was that the particular group would be on the jury-service list. *Id.*

Here, assuming for the sake of argument that "jury eligible" means everyone over age 18 in Milwaukee county,[4] calculating the absolute disparity would mean subtracting the percentage of African-American jurors actually summoned for juries during 2015 from 24.35%, the

---

[2] It was in 2008 that Wis. Stat. § 756.04 changed significantly, requiring the office of the director of state courts to compose the master and prospective lists. Thus, it is questionable that data for 2007 is, in any way, relevant to the composition the qualified juror pool and venires in 2015.

[3] The State has provided the report in its supplemental appendix.

[4] It does not; to be qualified for jury service, a person must be a U.S. citizen, over age 18, proficient in English, and without a felony conviction. Wis. Stat. § 756.02.

percentage of jury eligible African-American residents in the county.

Dunn has misunderstood how this calculation is done. (Dunn's Br. 15 n.3.) Instead, he has subtracted the percentage of African-American and Hispanic jury-eligible residents in the total population from the percentage of African-American and Hispanic residents on the DOT list. (Dunn's Br. 14–16.) Even if that were a correct calculation of absolute disparity, those numbers still show underrepresentation of African-American residents by only 1.89%, and underrepresentation of Hispanic residents by only 3.91%—far below the ten percent threshold.

Further assuming that the percentages of African-American and Hispanic jurors who actually reported for venires in 2006 can be reliably extrapolated to today, Dunn's claim still fails. The 2007 report indicated that African-American, voting-age citizens constituted 23.6% of the total voting-age population, and there were 798 sworn African-American jurors in 2006—16.3% of total sworn jurors. (Dunn's Br. 22.) That is a potential absolute disparity of only 7.3%, and a comparative disparity of only 31%. Hispanic voting-age citizens comprised 6.3% of the total voting-age citizens in Milwaukee County. (Dunn's Br. 22.) There were 158 sworn Hispanic jurors in 2006, constituting 3.2% of the total sworn jurors. That is a potential absolute disparity of only 3.1%, and a comparative disparity of only 49%. (Dunn's Br. 22.) Presumably, some of the African-American and Hispanic members of the venires were not actually sworn onto a jury, so real absolute and comparative disparity for venires for that time frame is likely even lower.

Further, the Basic Jury System Evaluation Report appended to Dunn's postconviction motion and included in his appellate brief forecloses any argument that African-American and Hispanic jurors were not fairly and reasonably represented in the prospective juror pool in relation to their

proportion in the community. The report shows that as of 2015, there were 175,954 African-American, adult residents of Milwaukee County. (R. 51:25; Dunn's Br. 15.) That amounts to 24.35% of the total adult population of Milwaukee County. (*Id.*)

The master juror list pulled from the DOT list resulted in a list of 571,724 people that included 128,411 African-American residents—22.46% of the master list. (R. 51:25; Dunn's Br. 15.) Once exceptions were accounted for, the potential qualified juror pool contained 99,764 people that included 24,922 African-American residents—24.98% of the total pool of prospective jurors. (*Id.*) Thus, the use of the DOT lists to construct the qualified juror pool for Milwaukee County resulted in African-American representation that was *higher* than the percentage of African-American residents in the population. The percentage of African-American potential jurors was 24.98%; the percentage of African-American residents of Milwaukee County was 24.35%. That is a fair and reasonable proportion of prospective jurors in relation to the proportion of African-American residents of Milwaukee County.

The use of the DOT list also resulted in a fair and reasonable proportion of Hispanics in the qualified juror pool. There were 85,142 Hispanic adult residents in Milwaukee County—11.78% of the population. (R. 51:25; Dunn's Br. 14–15.) The master juror list included 45,004 Hispanic people—7.87% of the master list. (R. 51:25; Dunn's Br. 14–15.) Once exceptions were accounted for, the prospective juror pool included 8,731 Hispanic people—8.75% of the prospective juror pool. (R. 51:25; Dunn's Br. 14–15.) While the use of the DOT list did result in a slight underrepresentation of Hispanic persons in 2015, the difference between the percentage of Hispanics on the prospective juror pool and the percentage of Hispanics in the population was only 3.03%.

"As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation." *McAnderson*, 914 F.2d at 941. *See also Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (where African-American jurors comprised 12% of the potential venire and community was 20% African-American, disparity was *de minimus*); *Pruitt*, 95 Wis. 2d at 78 (jury venires where 12.7% of potential jurors were under the age of 30 was fair and reasonable representation of young people even though they comprised 25% of the total population of the county). Dunn has not shown any discrepancy approaching that ten percent threshold.

2. Dunn has conflated the fair and reasonable representation analysis with the systematic exclusion analysis, and consequently cannot meet either element of the test.

Nonetheless, Dunn argues that using the DOT list does not provide fair and reasonable representation of minorities because it "excludes the considerable number of residents who do not have a driver's license or photo ID," and a higher proportion of minority residents do not have one of these forms of identification when compared to white residents. (Dunn's Br. 18–24.) That is the wrong analysis. If anything, this would go to the third step of the *Duren* test: whether the underrepresentation is due to systematic exclusion of the group in the jury-selection process. But before reaching that analysis, Dunn had to meet the second step and show that the proportion of African-Americans and Hispanics in the prospective pool is underrepresentative in the first place. In other words, Dunn had to show "that the representation of this *group* in venires from which juries are selected is not fair and reasonable *in relation to the number of such persons in the community*." *Duren,* 439 U.S. at 364 (emphasis added). Fair and reasonable representation in the prospective jury

pool is about relative proportions of groups in the jury pool, not relative proportions of individuals within a group who may receive a summons. In short, a systematic exclusion analysis does not become necessary until Dunn first shows that using the DOT list results in *a proportion of African-Americans and Hispanics in the prospective jury pool* that is not fair and reasonable in relation to *the proportion of African-Americans and Hispanics in the county's population as a whole*. *See Duren*, 439 U.S. at 365–66; *Pruitt*, 95 Wis. 2d at 78.

Dunn has fallen far short of doing so. Dunn's own evidence shows that African-Americans and Hispanics were not excluded from the qualified juror pool as a group. Using the DOT list resulted in a prospective juror pool that proportionally *overrepresented* African-American residents by 0.63%, and underrepresented Hispanic residents by only 3.03%. In other words, potential black jurors were overrepresented in the jury wheel related to their proportion in the community, and the discrepancy between the proportion of Hispanic residents in the community and the proportion of Hispanic prospective jurors was *de minimus*. *McAnderson*, 914 F.2d at 941. Yet, Dunn claims that this Court should give little weight to the numbers because they are not "standing alone," but are "given context through the systemic exclusion Mr. Dunn has shown, in the form of Milwaukee County's exclusive reliance on the DOT list." (Dunn's Br. 23.) This Court should reject that contention. Dunn has shown only that using the DOT list results in exclusion of certain African-American and Hispanic individuals, not that it results in an unreasonably low proportion of African-American and Hispanic prospective jurors in the jury pool or the systematic exclusion of the group from the jury pool.

Moreover, Dunn fails to acknowledge that the 2007 report concluded that by far the largest contributor to the

disparity was *not* the use of DOT list, but the failure of African-American and Hispanic jurors to respond to the summons. (R-App. 126.) He provides nothing showing that more minority jurors would respond if other lists were used. He has failed to show that the representation of African-Americans and Hispanics in the qualified juror pool and in the venires was not fair and reasonable in relation to the number of such persons in Milwaukee County. He has also failed to show any systematic exclusion of those *groups* in the jury-selection process. There was no need for a hearing on his claim and this Court should affirm the circuit court's order on those grounds.

II. Dunn's *Batson* claim is forfeited and fails on the merits.

A. Dunn failed to raise his equal protection claim based on *Batson v. Kentucky* at trial and has therefore forfeited the claim.

This Court has long required "that the appellant articulate each of its theories to the trial court to preserve its right to appeal." *State v. Rogers*, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (1995). Indeed, "[i]t is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner,* 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "Without a specific objection which brings into focus the nature of an alleged error, a party does not preserve its objections for review." *Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (1985). This Court has cautioned that "[w]e will not . . . blindside trial courts with reversals based on theories which did not originate in their forum." *Rogers*, 196 Wis. 2d at 827.

Dunn never raised an equal protection challenge to the prosecutor's use of peremptory strikes in the trial court. (R.

76:159–65.) What trial counsel did was ask the court to use its "inherent authority" and strike the jury panel because "one juror out of fourteen is far below what the voting age population is of African-Americans in Milwaukee County." (R. 76:160.) That is not a claim that the prosecutor used peremptory strikes for a racially discriminatory purpose. Dunn's sole complaint was that one African-American juror out of fourteen did not match "the racial make up of Milwaukee County as a whole" and therefore he believed he was being deprived of his constitutional "right to a jury of his peers." (R. 76:161, 164.) Though trial counsel referred to *Batson v. Kentucky* (R. 76:9, 160), as Dunn admitted in his postconviction motion, trial counsel was citing the case for the wrong proposition. (R. 51:18 n.7.)

When Attorney Klimetz began arguing about the racial composition of the jury the court told him "as you have already established, you do not have the basis for a *Batson* challenge. . . . you were sort of making an equity-type argument." (R. 76:161.) The prosecutor preemptively offered race-neutral reasons for striking two African-American members of the venue, anticipating a *Batson* challenge, but Attorney Klimetz never made one. (R. 76:159–65.) Consequently the trial court never undertook a full *Batson* analysis. (R. 76:162.) Accordingly, the record is inadequately developed to allow this Court to meaningfully review Dunn's current *Batson* claim.

Dunn's *Batson* claim is forfeited, and the record is insufficiently developed for this Court to review the claim. This Court should decline to address it.

B. Dunn's claim that the prosecutor acted with racially discriminatory intent when he struck two African-American jurors fails on the merits.

The forfeiture rule is one of judicial administration and exceptions are made. *Wirth*, 93 Wis. 2d at 443–44. "These exceptions to the general rule, however, involve questions of law which, though not raised below, may nevertheless be raised and decided by this court on appeal." *Id.* (citation omitted). A *Batson* challenge deals with questions of fact, not questions of law. *State v. Lopez*, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (1992). Because Dunn did not properly raise this challenge in the trial court, neither the court nor the prosecutor gave the three prongs much consideration on the record. Nevertheless, the State will address the claim in case this Court should determine that the record is sufficiently developed and opt to review it.

1. Standard of review

The three considerations for a *Batson* challenge are all questions of fact that this Court reviews under a clearly erroneous standard. *Lopez*, 173 Wis. 2d at 729.

2. Relevant law

The Equal Protection Clause bars prosecutors from "challeng[ing] potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Courts employ a three-step process for determining if a prosecutor's peremptory strikes violate equal protection. *Id.* at 96–98.

First, to establish a prima facie case of discriminatory intent, Dunn must establish that he "is a member of a cognizable group and that the prosecutor has exercised

peremptory strikes to remove members of [his] race from the venire, and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." *State v. Lamon*, 2003 WI 78, ¶ 28, 262 Wis. 2d 747, 664 N.W.2d 607 (citing *Batson*, 476 U.S. at 96).

In determining whether the defendant made a prima facie showing, the circuit court must consider all relevant circumstances, including "any pattern of strikes against jurors of the defendant's race and the prosecutor's voir dire questions and statements." *Lamon*, 262 Wis. 2d 747, ¶ 28. In *Batson*, the Supreme 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." *Batson,* 476 U.S. at 97.

Second, if the circuit court finds that the defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging [the dismissed venire person]." *Lamon*, 262 Wis. 2d 747, ¶ 29 (quoting *Batson*, 476 U.S. at 97). A "'neutral explanation' means an explanation based on something other than the race of the juror." *Id.* ¶ 30. "Facial validity of the prosecutor's explanation is the issue." *Id.* Unless discriminatory intent is inherent in the prosecutor's explanation, "the reason offered will be deemed race neutral." *Id.* (citation omitted).

The third step of *Batson* requires the circuit court to weigh the credibility of the prosecutor's race-neutral explanation and determine if purposeful discrimination has been established. *Id.* ¶ 32. Under this third step, the defendant may show that the reasons proffered by the prosecutor are pretexts for racial discrimination. *Id.* "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." *Id*. (citing *Batson*, 476 U.S. at 94 n.18).

3. Dunn did not establish a prima facie case of purposeful discrimination.

The State acknowledges that under *Hernandez v. New York*, 500 U.S. 352, 359 (1991), whether Dunn showed a prima facie case of purposeful discrimination under the first prong of *Batson* may not be at issue here because the prosecutor offered race-neutral reasons for striking the jurors without Dunn's first showing purposeful discrimination. (Dunn's Br. 30.) Nevertheless, the transcript shows that the trial court found that Dunn did not establish a prima facie case, and that finding is not clearly erroneous.

There is no dispute that Dunn is African-American and the prosecutor used two peremptory strikes to remove two African-American jurors. But Dunn never argued that "the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." *See Lamon*, 262 Wis. 2d 747, ¶ 28. As Attorney Klimetz began arguing that the trial court should strike the jury panel because it did not match the racial composition of Milwaukee County as a whole, the trial court found that he could not make a prima facie showing under *Batson*: "as you have already established, you do not have the basis for a *Batson* challenge. . . . [y]ou were sort of making an equity-type argument." (R. 76:161.)

The court's finding that Dunn could not establish a *Batson* claim was not clearly erroneous. There were three potential African-American jurors included in the 30 person venire. (R. 76:8.) The State struck two of them, jurors number two and twelve, but the third remained and served on the jury. (R. 76:162–63.) That does not establish a "pattern" of strikes against African-American jurors, and it is not enough to raise an inference of purposeful discrimination. *Batson*, 476

U.S. at 96–97. Indeed, even where the prosecutor has struck all members of the defendant's race from the jury, that fact alone is not enough to make a prima facie showing of purposeful discrimination. *See State v. Walker*, 154 Wis. 2d 158, 174 n.7, 453 N.W.2d 127 (1990) *abrogated on other grounds by State v. Felix*, 2012 WI 36, ¶ 19, 339 Wis. 2d 670, 811 N.W.2d 775. Dunn failed to point to any other facts and circumstances suggesting discriminatory intent in the trial court. *Lamon*, 262 Wis. 2d 747, ¶ 28. Consequently the trial court cannot have erred in rejecting his claim.

4. The trial court's finding that the prosecutor's race neutral reasons for striking those jurors was not clearly erroneous.

Dunn's claim also fails because the trial court found the prosecutor's race-neutral explanation credible, and that finding is not clearly erroneous.

Dunn asked the court to strike the jury panel because "having one juror out of fourteen is far below what the voting age population is of African-Americans in Milwaukee County . . . I think it's not something that indicates fairness and propriety." (R. 76:160–61.) The court asked the prosecutor to respond and he said,

> I'm going to ask that the Court deny the request.
>
> There's got to be some showing of something intentional from either the prosecuting agency or from, in some way, shape, or form, the way jurors are polled.
>
> There's certainly no information either way to indicate that.
>
> I can tell the Court, because now I'm going to make a record . . . I struck juror number two . . . because she was asleep and juror number twelve because she works third shift.

> And in general, I strike third shifters.
>
> So, there's your race neutral explanation for the record on why those jurors got struck.

(R. 76:162).

Dunn maintained his objection that it was unfair that the panel did not match the racial makeup of Milwaukee County and responded only,

> I don't remember number two falling asleep. I didn't notice that. And no record of it was made to the Court that could have been grounds for her to be excused for cause.
>
> And if the juror that worked third shift was excluded solely because she has to work third shift, I think she could well explain that that wouldn't be a problem that she could even get that day off.
>
> . . . .
>
> And, furthermore, there was another [juror] that indicated that he worked third shift as well, and that person was not struck.
>
> So, Judge, I do think you have authority and the right to make sure that there's a fair trial.
>
> And that includes the fairness in the terms of racial make up of the jury.
>
> And I submit to you that you should use your inherent authority to strike this panel and start over again.

(R. 76:164–65.) The court responded:

> All right. Thank you. And I agree with [the prosecutor], there's not a basis here to -- certainly, not under *Batson*. But I don't think that based on what I've heard here and what I've seen here that there's any reason based on equity or other grounds to strike this jury panel.

(R. 76:165.)

In other words, the court found that Dunn had neither made out a prima facie case of discriminatory intent nor had he pointed to anything that showed that the prosecutor's reasons were a pretext for purposeful discrimination.

Dunn's post-hoc argument that the reasons must be pretextual because the prosecutor's concerns about these two jurors could have been addressed through other means, and that juror twenty-five also worked third shift, fails to establish that the circuit court erred for two reasons. (Dunn's Br. 31–32.)

First, Dunn misrepresents what juror twenty-five said about his work schedule. Juror twelve said that she works third shift and started at ten-thirty every night. (R. 76:136–37.) Juror twenty-five said that he's a foreman in a construction company for landscaping and snow removal services. (R. 76:60.) He did not work third shift. (R. 76:138.) He said that because he does snow removal service, "whenever it starts snowing, I have to go." (R. 76:138.) His answer indicated that he could potentially be called in at odd hours, not that he worked third shift. (R. 76:136–39.) Indeed, the next portion of the voir dire indicates that was Attorney Klimetz's understanding as well. (R. 76:138.) After juror twenty-five explained that he had to work "whenever it starts snowing," defense counsel asked whether anyone else had a work schedule that may make them tired during the trial. (R. 76:138–39.) Two other jurors, jurors twenty-two and twenty-nine, responded that they did. (R. 76:138–41.) Neither was ultimately on the jury, but they were removed for reasons unrelated to their work schedules. (R. 76:155–57.) Juror twenty-five remaining on the jury does not refute the prosecutor's explanation that he regularly strikes third shifters because juror twenty-five did not work third shift.

Second, the fact that the prosecutor did not attempt to strike juror number two for cause, or that steps could have been taken during the trial to keep her awake, does not mean

that this Court must now presume that the prosecutor's reason was a pretext for discrimination. (Dunn's Br. 32.) *See Lamon*, 262 Wis. 2d 747, ¶ 38. To the contrary, the fact that sleeping would have been a sufficient reason to strike juror two for cause bolsters, not weakens, the plausibility of the prosecutor's justification for striking her. *See id.* ¶ 32 (explaining that the defendant has the burden of persuading the court that the prosecutor's explanations were a pretext, and therefore the plausibility of the prosecutor's reasons for the strike become relevant). Simply because the prosecutor chose to use a peremptory strike rather than have the juror struck for cause does not show that his reason was pretextual.

Ultimately, Dunn had to show that the circuit court clearly erred when it found the prosecutor's assertions credible. *Id.* That means pointing to other portions of the record showing that under the totality of the circumstances, the court should have found purposeful discrimination and it was clearly erroneous for the court not to do so. Instead, he erroneously claims that this Court must presume that the prosecutor's reason for striking juror two was pretextual because the prosecutor did not call attention to her sleeping, he fails to acknowledge that juror twenty-five never worked third shift unless it began snowing at night, and he speculates about steps that could have been taken to keep jurors two and twelve on the panel. (Dunn's Br. 27–32.) None of that shows that the circuit court clearly erred and should have found purposeful discrimination. Consequently, Dunn's *Batson* challenge fails.

III. The facts alleged in Dunn's postconviction motion did not establish that counsel's failure to cross-examine Ganske was deficient or prejudicial, thus the circuit court properly denied his ineffective assistance claim without a hearing.

A. Standard of review

Whether Dunn sufficiently pled his claim of ineffective assistance of counsel to trigger a hearing presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court must first determine if Dunn alleged sufficient facts that, if true, would entitle him to relief. This is a question of law and is reviewed de novo. *Id.* "If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing." *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (citation omitted). "This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Id.*

B. Relevant law

It is well-settled that the right to counsel contained in the United States Constitution[5] and the Wisconsin Constitution[6] includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

Merely asserting ineffective assistance of counsel is not sufficient to warrant a hearing on the claim. *Phillips*, 322 Wis. 2d 576, ¶ 17. To receive a hearing, Dunn had to allege

---

[5] U.S. Const. amends. VI, XIV.

[6] Wis. Const. art. I, § 7.

sufficient material facts which, if true, would entitle him to relief. *State v. Balliette,* 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. If Dunn didn't allege sufficient material facts, or presented conclusory allegations, or if the record conclusively demonstrated he wasn't entitled to relief, the circuit court could exercise its discretion and deny his motion without a hearing. *Bentley,* 201 Wis. 2d at 309–10.

A motion satisfies the "sufficient material facts" standard when it "allege[s] the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen,* 274 Wis. 2d 568, ¶ 23. It must include enough facts to allow the circuit court to meaningfully assess the defendant's claim. *Id.* ¶ 21. Meaning, Dunn's motion had to contain sufficient facts to establish deficient performance and prejudice under *Strickland*.

The motion had to contain facts that established that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

The motion also had to contain sufficient facts to establish that "there is 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. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted).

Given the standard of review for denying a *Machner* hearing, this Court typically reviews only the allegations contained in the postconviction motion, not any additional

allegations contained in the defendant-appellant's brief. *Allen,* 274 Wis. 2d 568, ¶ 27.

C. Counsel's failure to cross examine Ganske about her level of certainty in identifying her Ford Explorer and Dunn on the surveillance video was not deficient performance.

The postconviction court properly denied Dunn's motion without a *Machner* hearing. Nothing Dunn alleged established that trial counsel performed deficiently by failing to cross-examine Ganske about her ability to identify Dunn or her own car on the surveillance video.

It is beyond dispute that "in determining whether or not counsel had been effective, it is not appropriate by hindsight to insist on what would have been an ideal defense—but rather that a defendant is entitled to a defense which, under all the facts, would have afforded reasonably effective representation." *State v. Felton*, 110 Wis. 2d 485, 501, 329 N.W.2d 161 (1983). The Wisconsin Supreme Court "has often stated that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *Id.* at 502.

In his postconviction motion, Dunn admitted that "[t]rial counsel's cross examination of Ganske indicated . . . that he knew he needed to undermine her credibility," and "attacking Ganske's motivation to lie to protect her child was an important strategy." (R. 51:8–9.) He made no argument that counsel's decision to cross-examine Ganske about changing her story after being threatened with a felony conviction and loss of her child was unreasonable. (R. 51:7–9.) He simply claimed that counsel also should have questioned Ganske about her identification of her Explorer and of Dunn

on the surveillance video, because that might have further undermined her credibility. (R. 51:8–9.)

Viewing the surveillance video supports a reasonable decision to not pursue that line of questioning. The poorly reproduced black-and-white still photographs appended to Dunn's postconviction motion are not representative of the quality of the video. The surveillance video is in color, sharp, and clear. (Ex. 1.) Ganske knew Dunn for over ten years and had been intimate with him for seven months. (R. 78:84–85, 99–100.) Given her familiarity with Dunn, she would have easily identified him. Similarly, Ganske identified her own vehicle. (R. 78:99.) An average person can generally identify their own vehicle when they see it. The clarity of video would have made any challenge to Ganske's identification of Dunn and her Explorer a wasted exercise; no reasonable juror who had seen the clarity of the video would have questioned Ganske's identifications. Counsel is not deficient for failing to take actions that would have been fruitless. *Strickland*, 466 U.S. at 691.

"There are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Postconviction counsel's identification of a possible line of questioning that was not pursued does not mean that trial counsel performed deficiently.

D. There is not a reasonable probability that cross-examining Ganske about her identification would have caused the jury to have a reasonable doubt about Dunn's guilt.

The circuit court appropriately determined that Dunn did not sufficiently establish that he was prejudiced by counsel's failure to cross-examine Ganske about her identifications. There was no possibility, let alone a probability, that had counsel cross-examined Ganske about

her identifications from the surveillance video the result of Dunn's trial would have been different.

As explained above, the video was clear and high quality. Ganske had known Dunn for ten years and dated him for seven months. The jury saw the video twice. There is not a reasonable probability that the jury would have doubted Ganske's identifications had counsel cross-examined her about them. No amount of cross-examination of Ganske would have negated the other damning evidence showing that Dunn participated in the robbery. It would not have negated the fact that, the very next day, Dunn was found with Parker and Cooper in a red Ford Explorer that matched the one on the video and with a license plate that matched the plate number given to police. It would not have negated Ganske's testimony that she let Dunn borrow her red Ford Explorer, which also matched the one on the video. Perhaps most importantly, it would not have negated the fact that some of the proceeds of the robbery, V.S. cell phone, were found at Dunn's mother's house.

The State does not dispute that its response to Dunn's postconviction motion incorrectly argued sufficiency of the evidence, which is not the test for prejudice under *Strickland*. (*See* Dunn's Br. 39–40). *See also State v. Sholar*, 2018 WI 53, ¶ 44, 381 Wis. 2d 560, 912 N.W.2d 89. That does not mean, however, that the circuit court erred when it "focused on the other evidence adduced at trial." (*See* Dunn's Br. 40.) To the contrary, a court engaged in the *Strickland* prejudice analysis must consider the other evidence adduced at trial. *Strickland*, 466 U.S. at 695 ("In making [the prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). And as shown, the circuit court properly determined that nothing Dunn alleged undermines confidence in the outcome of his trial because it would not have called into question the wealth of other evidence tying Dunn to the crime. Therefore, the

postconviction court appropriately exercised its discretion when it denied Dunn's motion without a hearing.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 10th day of August, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,752 words.

Dated this 10th day of August, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 opposing parties.

Dated this 10th day of August, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Michael Exhavier Dunn
Case No. 2018AP783-CR

Description of document	Page(s)
An Audit of the Jury Selection Process In the Milwaukee County Circuit Court System, Committee on Finance and Audit, July 2007	101–168

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of August, 2018.

_____

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 10th day of August, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General