STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP783-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL E. DUNN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable William S. Pocan, Presiding, and from the Decision and Order Denying Postconviction Relief, the Honorable David A. Hansher, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES CITED

ARGUMENT

I. Mr. Dunn was deprived of his right to a jury drawn from a representative cross-section of the community.

Mr. Dunn maintains his argument that he was deprived of his right to a jury drawn from a representative cross-section of the community, that black and Hispanic representation in the Milwaukee County jury pool is not fair and reasonable in relation to the number of such persons in the population, and this underrepresentation stems from the systematic exclusion of those groups in the jury selection process. Specifically, Mr. Dunn maintains that the system of reliance on the Department of Transportation list results in underrepresentation of black and Hispanic residents compared to their proportions in the Milwaukee County community due to those residents' underrepresentation on the DOT source list because they are less likely to possess driver's licenses or photo identification cards.[1] Mr.

[1] The state argues that Mr. Dunn failed to prove that the master jury wheel is only drawn from the Wisconsin Department of Transportation list. (State's br. p.17). Mr. Dunn relies on the information provided by Milwaukee County, on its official government website, specifically stating the following: "The names used for our jury pool are obtained from the Wisconsin Department of Transportation list. This includes drivers and those with identification cards. Milwaukee County does NOT currently use voter lists for names." (84:1).

Dunn's trial attorney argued that the jury panel should be stricken, and postconviction, he argued he sufficiently met his burden to show a prima facie violation of the fair cross-section requirement.

Yet, the state asserts that Mr. Dunn failed to provide "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." (State's br. p.17-18). However, Mr. Dunn relied on the figures provided by Milwaukee County itself for jury year 2015, in a document titled, "Basic Jury System Evaluation Report," which was attached to his postconviction motion. (51:25-30); (Dunn brief-in-chief p.14-16). Similarly, the calculations of absolute and comparative disparities that the state asserts were incorrectly calculated, were in fact calculated by Milwaukee County and reported on their Basic Jury System Evaluation Report. (State's br. p.18-19); (51:30).

The state also argues that, "As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation." (State's br. p.21)(quoted source omitted). Mr. Dunn already addressed this argument in his brief-in-chief, acknowledging that the jury pool need not be a "statistical mirror of the community," but arguing that the discrepancies he identified, while less than ten percent, did not stand alone, but were given context through the systemic exclusion

shown in the form of exclusive reliance on the DOT list. (Dunn brief-in-chief p.23).

The state next argues that Mr. Dunn "provides nothing showing that more minority jurors would respond if other lists were used." (State's br. p.23). It also argues that Dunn's argument regarding driver's licenses and photo identifications goes "to the third step of the *Duren* test: whether the underrepresentation is due to systematic exclusion of the group in the jury-selection process." (State's br. p.21). However, Mr. Dunn argued that there are disparate racial effects that result from using only photo identification cards and driver's licenses in order to create the master jury wheel, and it is *that* system that results in underrepresentation of black and Hispanic residents compared to their proportions in the community. (Dunn brief-in-chief p.17-21). In fact, Mr. Dunn's argument to this effect is under the heading, "The underrepresentation results from systematic exclusion of the group in the jury selection process" and the argument begins with, "Turning to the third prong of the *Duren* test…." (Dunn brief-in-chief p.16-17).

This Court should conclude that Mr. Dunn met his burden to show a prima facie violation of the fair cross-section requirement. The state failed to provide any compelling justification for the systematic exclusion of the distinctive group, and therefore, Mr. Dunn respectfully requests that this Court conclude that he was deprived of his constitutional right to be tried by an impartial jury drawn from sources

reflecting a fair-cross section of his community. *Duren v. Missouri*, 439 U.S. 357, 368 fn.26 (1979).

II. The circuit court's finding that the strikes of prospective Jurors 2 and 12 were not purposeful discrimination was clearly erroneous.

The state argues Mr. Dunn's *Batson* challenge was not properly raised in the trial court, and that "neither the court nor the prosecutor gave the three prongs much consideration[.]" (State's br. 25). The state is wrong. Trial counsel sufficiently raised the issue of the state's improper strikes of black jurors such that both the prosecutor and the trial court adequately understood his objection. (76:159-160; App.143); *see also Hernandez v. New York*, 500 U.S. 352, 359 (1991)("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). The prosecutor's clear understanding of the objection lodged was demonstrated by his cogent response:

> 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, that I struck two African-American jurors. I struck juror number 2 for that because she was asleep

> and juror number 12 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.

(76:162-165; App.144-145). The prosecutor's statement was a "clear and reasonably specific explanation of legitimate reasons, related to the particular case," as required by the Wisconsin Supreme Court in *State v. Lamon*, 2003 WI 78, ¶31, 262 Wis. 2d 747, 664 N.W.2d 607.

Likewise, the circuit court clearly understood the defense objection and the state's response, and accordingly, agreeing with the prosecutor, it concluded there was not a basis under *Batson*, or any other reason, to strike the jury panel. (76:162-165; App.144-145). The state's claim on appeal that the trial court never undertook a full *Batson* analysis is incorrect, and the record is sufficiently developed for this Court's review.[2]

In addition, as the state itself admits in its brief, the forfeiture rule is one of judicial administration. "The forfeiture rule facilitates fair

[2] Moreover, when the circuit court fails to appropriately conduct the "*Batson* inquiry," this Court reviews that decision denying a *Batson* challenge de novo. *United States v. McMath*, 559 F.3d 657, 663 (7th Cir. 2009). If this Court is satisfied that a *Batson* error occurred, it must remand for a new trial, as "intentional discrimination on the basis of race in jury selection is a structural error." *Winston v. Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011).

and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial." *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. It also gives the circuit court a chance to address the perceived error. *Id.* Here, the circuit court was made aware of the defense's complaint regarding the state's striking of African American jurors from Mr. Dunn's jury. Between trial counsel's complaint and the prosecutor's response, the circuit court was given a chance to address the perceived error, as the law requires. If this Court finds this issue was forfeited, it should nevertheless address this claim due to the significant constitutional dimensions of the argument, and because illegal racial discrimination continues to be a recurring problem. *See* "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," issued by the Equal Justice Initiative in August 2010 at p.14-19(noting racial bias in jury selection remains a persistent problem). (Available online at https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf)

As Mr. Dunn explained in his brief-in-chief, the first step of analyzing his *Batson* challenge on appeal is moot because the prosecutor offered a race-neutral explanation for his peremptory challenges and because the circuit court ruled on the ultimate question, agreeing with the prosecutor. *Hernandez*, 500 U.S. at 359. Thus, the question for this Court is whether the circuit court erred when it agreed with the prosecutor that there was no purposeful

discrimination and no pretext for discrimination. *State v. Gregory*, 2001 WI App 107, ¶28, 244 Wis. 2d 65, 630 N.W.2d 711.

The state argues that Mr. Dunn misrepresented juror 25's work schedule. (State's Br. 30). He did not. During voir dire, trial counsel asked whether any other prospective jurors worked a shift that would require them to go to work after jury duty. (76:138; App.138). Juror 25 raised his hand. (76:138; App.138). The circuit court told juror 25, "Same thing would apply there," referencing his prior statement to prospective juror 12 that court staff could provide paperwork because the court did not want jurors also working at night. (76:138; App.138). Simply because juror 25 does not work a conventional job, like that of a night shift nurse, does not lessen his concerns about his schedule as a winter services worker serving as a juror on a trial occurring well within the winter season in Milwaukee, Wisconsin. The state's failure to strike juror 25, who had responded to questioning implicating the same concerns at issue with third shift work, is suspect. *See Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998) ("A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic").

Importantly, the state on appeal fails to respond to Mr. Dunn's argument that regardless of the prosecutor's general policy against third-shift employees, the prosecutor's alleged concern about

third-shift employees was already alleviated by the court's explanation to prospective juror 12 that she could obtain paperwork excusing her from her night shifts. (Dunn brief-in-chief p.31); *see Charolais Breeding Ranches, Ltd. v. FPC Secs, Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted appellate arguments are deemed conceded). Prospective juror 12 told the circuit court that she would indeed be able to miss work so long as she had the necessary paperwork from the court. (76:136-37; App.138). This exchange—in which the court explained the process by which prospective juror 12 would be able to miss work in order to be awake and alert for trial, and prospective juror 12's response indicating that the paperwork would be sufficient to excuse her from her night shifts during the pendency of the trial—demonstrates the circuit court's denial of the challenge to the peremptory strike of prospective juror 12 was clearly erroneous because it was a pretext for purposeful discrimination.

The state also argues that Mr. Dunn failed to point to other portions of the records showing that under the totality of the circumstances, the circuit court should have found purposeful discrimination. This Court can look no further than prospective juror 2's engagement throughout the rest of voir dire.

Prospective juror 2 told the court she was single, self-employed, and worked at Wheaton Franciscan Evangelical as a health unit coordinator. (76:32-33; App.111-112). She told the court she had two children, ages five and sixteen, and that she lived

in West Allis. (76:32; App.111). She said she had never served on a jury, did not have any families in law enforcement or criminal justice, and she had never been a victim of a crime. (76:32; App.111). When the prosecutor began asking questions of the jurors beyond the basic information each juror had provided, prospective juror 2 raised her hand when the prosecutor asked people who worked in hospitals to raise their hands. (76:106-107; App.130). Prospective juror 2 told the prosecutor that she did not work third shift. (76:107; App.130). When the prosecutor asked whether anyone was familiar with the Days Inn on 108th Street, prospective juror 2 raised her hand and explained that, because she lived in West Allis, she drove by that location every day. (76:111-12; App.131). Prospective juror 2 was again on the record in response to trial counsel's question whether she knew someone named Olivia Lobley. (76:136; App.137).

Based on the record, prospective juror 2 stayed engaged throughout the jury selection process, volunteering answers when appropriate and responding appropriately to the questions asked of her. She participated in several follow-up questions that were asked at various points during voir dire. (76:32-33, 106-107, 111-12, 136. (App.111-12, 130-31, 137). The record discloses no basis for the prosecutor's unreviewable claim that she was sleeping. In addition, despite his alleged concern, the prosecutor did not ask prospective juror 2, or the potential jurors more broadly, any questions regarding their ability to stay awake and attentive.

(76:105-131; App.130-136). In light of this record, the state's claim that prospective juror 2 was struck for sleeping should be seen as a pretext for racial discrimination, and this peremptory challenge was unlawful.

Last, the state argues, "There were three potential African-American jurors included in the 30 person venire. The State struck two of them, jurors number two and twelve, but the third remained and served on the jury. That does not establish a 'pattern' of strikes against African-American jurors, and it is not enough to raise an inference of purposeful discrimination." (State's br. p.27)(citations omitted). However, the fact that one African-American juror served on Mr. Dunn's jury does not undermine his argument of purposeful discrimination in the striking of prospective jurors 2 and 12. "It is the striking of a single black juror for racial reasons that invokes the shelter of the Equal Protection Clause, even though other black jurors are impanelled." *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991); *see also United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("[T]he striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.")

III. Mr. Dunn's postconviction motion contained sufficient factual allegations to entitle him to an evidentiary hearing on his claim that he was prejudiced by trial counsel's deficient performance.

Mr. Dunn disagrees with the state's characterization of the surveillance video as "sharp and clear." (State's br. 35). Fortunately, the video is in the record and accordingly this Court may view the video for itself. (85:1). If it so chooses, it will see that the motel surveillance footage is of poor quality, and would not lead a reasonable person to believe that they could actually identify their own vehicle or their boyfriend if they were in Dana Ganske's shoes.

In the prosecutor's own words:

> The fight in this case is about who are those three people [responsible for attacking V.S.], and really, it's only about Michael Dunn. And the fight in this case is, is he the third man[?] Is Michael Dunn, the defendant, the third man[?]…How do we know that's Michael Dunn? Dana Ganske, who we'll circle back around to, pointed to him and said, that's Michael Dunn. How does she know it's Michael Dunn? Number one, she's known him for ten years. Number two, at this point they're dating. Number three, he is wearing the clothes that [Dana] bought him. ...On the surveillance videos how do we know it's Michael Dunn? This truck is Dana Ganske's truck. ... Michael Dunn's girlfriend [is] picking him out on the video saying, '[T]hat's him. Those are the clothes I bought him. That's my truck.'

(79:26, 30, 32). Aside from Ganske's testimony, no other evidence placed Mr. Dunn at the Days Inn at the time of the robbery. The state points to circumstantial evidence, but no direct evidence other than Ganske's testimony. The prosecutor's emphasis on Ganske's testimony in his closing argument shows just how important this testimony was to the state's case against Mr. Dunn.

The postconviction court erred in denying Mr. Dunn's motion without an evidentiary hearing. The state conceded its postconviction response argued the incorrect standard, (State's br.36), which is the same standard the postconviction court used in denying Mr. Dunn an evidentiary hearing.

Again, the Wisconsin Supreme Court has explained that even when there is sufficient evidence to sustain a conviction, an error can still infect a trial and have a "pervasive effect on the inferences to be drawn from the evidence." *State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). This Court should reverse and remand for an evidentiary hearing. *See State v. Love*, 2005 WI 116, ¶2, 284 Wis. 2d 111, 700 N.W.2d 62 (A court must hold an evidentiary hearing on a postconviction motion if the motion alleges "sufficient material objective factual assertions that, if true, entitle [the defendant] to relief.")

CONCLUSION

For the reasons stated above, Mr. Dunn respectfully requests this Court order a new trial, or to reverse and remand for a *Machner* hearing.

Dated this 7th day of November, 2018.

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,834 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of November, 2018.

Signed:

CARLY M. CUSACK
Assistant State Public Defender