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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1310-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALCOLM J. SANDERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. The circuit court found that the prosecutor did not strike two African-American jurors from the panel for a racially discriminatory purpose. Are the circuit court's findings clearly erroneous?

The circuit court made the findings.

This Court should answer, "No."

2. The court advised Defendant-Appellant Malcolm J. Sanders that it would not allow plea negotiations after the final pre-trial hearing. At that hearing, the defense informed the court that, one day earlier, it received a statement against Sanders from one his co-defendants. The court allowed Sanders time to confer with counsel but denied his adjournment request. Did the circuit court deprive Sanders of his constitutional right to counsel?

The circuit court did not address whether its denial of an adjournment deprived Sanders of his right to counsel.

This Court should hold that Sanders forfeited this claim, reject it as undeveloped, or answer, "No."

3. Prior to the close of evidence at trial, Sanders expressed frustration with his attorney's performance. The court explained it would not adjourn the jury trial, but indicated it may be willing to adjourn and continue it as a bench trial, if both parties agreed. Sanders chose to continue with the jury trial. Did the circuit court violate Sanders's due process rights by "forcing" him to choose between his right to a jury trial and right to the effective assistance of counsel?

The circuit court did not address whether it forced Sanders to choose between his rights.

This Court should hold that Sanders forfeited this claim, reject it as undeveloped, or answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Malcolm Sanders provided heroin for two surveilled drug deals. He worked with two co-defendants, Nicholas Hansen and Arthur Westmoreland. Police used a confidential informant to purchase the heroin, equipped the informant with a recording device, and watched the drug deals occur. Sanders chose to have a jury trial.

Sanders raises three claims on appeal; all fail. First, Sanders's *Batson* challenge fails because he cannot show that the circuit court's findings were clearly erroneous. The circuit court reasonably found that the prosecutor's questions in voir dire—asking whether any panelists had negative experiences with law enforcement—did not have a discriminatory purpose. Three jurors—two black, one not—answered yes to this question and indicated that their experiences may affect their ability to be fair; the State struck all three. Sanders incorrectly focuses on potentially discriminatory *impact*, when *Batson* requires proof of discriminatory *purpose*.

Sanders's second and third claims fail for the same basic reasons: (1) he forfeited them, (2) he fails to develop them on appeal, and (3) they fail on their merits.

Sanders never contemporaneously argued that the circuit court's denial of his request for an adjournment—which was sought to allow him more time to decide whether to accept the plea offer—violated his right to counsel. He also never contemporaneously argued that the court—by providing a possible alternative approach to address his mid-trial concerns about his attorney's performance (an approach

contingent on the State's agreement, which Sanders did not pursue)—forced him to choose between his constitutional rights. He never filed a postconviction motion raising these challenges, and he does not explain them on appeal.

His denial-of-counsel claim fails on its merits because the circuit court allowed him time to consult with counsel about his decision to go to trial, and he ultimately advised the court that he had sufficient time to make his decision. His argument that the court "forced" him to choose between his rights to a jury trial and the effective assistance of counsel also fails on its merits because he *had* a jury trial and counsel, and he has made no showing that he received ineffective assistance.

This Court should affirm.

STATEMENT OF THE CASE

The charges. The State charged Sanders with two counts of delivery of heroin, in an amount of more than 3 grams but less than 10 grams, occurring within 1000 feet of a youth center, as party to a crime, and as a habitual offender. (R. 1.)

The complaint, filed on June 15, 2016, detailed Sanders's involvement—along with co-defendants Nick Hansen and Arthur Westmoreland—in controlled buys on March 15, 2016, and March 22, 2016. (R. 1.) The complaint explained that on both occasions, a confidential informant arranged to buy heroin from Hansen at the same Burger King parking lot. (R. 1:2–4.)

As set forth in the complaint, police observed the following happen both times: Hansen and Westmoreland arrived together in Hansen's car; Hansen got out of his car, into the informant's car, and back into to his own car. (R. 1:3–4.) Sanders then arrived in a black Ford 500 and parked across the street. (R. 1:3–4.) Westmoreland got out of

Hansen's car, went across the street, got into Sanders's car, got out of Sanders's car, and returned to Hansen's car. (R. 1:3–4.) Hansen then got out of his car, got back into the informant's car, Sanders drove away, and Hansen returned to his car. (R. 1:3–4.)

The informant told police that, on both occasions, he gave Hansen the money when Hansen first got into his car; Westmoreland went and got the heroin from the "source" across the street, and Hansen then came back with the heroin. (R. 1:3–4.) The complaint also noted that police had recordings of the transactions. (R. 1:3–4.)

Relevant pre-trial proceedings. At a pre-trial hearing on November 10, 2016, appointed defense counsel explained that Sanders planned to retain counsel. (R. 75:2–3.) With Sanders present in court, the circuit court stated: "there will be no plea bargaining after the final pretrial." (R. 75:3.)

At another pre-trial hearing on November 28, 2016, Sanders, again with appointed counsel, explained he still intended to retain private counsel and expressed frustration with appointed counsel. (R. 76:3–7.)

At yet another pre-trial hearing on January 6, 2017, the State explained that it wished to try Sanders and Hansen together. (R. 77:2.) Sanders's newly-retained counsel (who represented him at trial) sought an adjournment, given the "newness of the case"; the State did not object to adjourning both cases. (R. 77:2.)

The Court granted the adjournment, set the trial for March 27, 2017, and scheduled a final pre-trial hearing. (R. 77:2–3.) Sanders's attorney noted he had another trial on March 29 and would prefer a different date; the court left the trial date on its calendar "because so many things resolve one way or the other." (R. 77:3.)

At the start of the final pre-trial hearing on March 9, 2017, Sanders's attorney again sought an adjournment of

the March 27 trial date because of his other trial on March 29. (R. 78:2.) The court said the motion was premature and explained that "the defendants have to make a final decision today about accepting a plea bargain or not." (R. 78:3.) The court reiterated: "[t]here will be no plea bargaining accepted after today without extraordinary circumstances." (R. 78:3.)

The court noted it had an off-the-record discussion with the attorneys about a written statement co-defendant Westmoreland gave police. (R. 78:4.)

Hansen's attorney asked the court to allow him until March 22 to advise as to whether Hansen would accept the plea offer; the court said no. (R. 78:3–4.)

The court gave both Hansen's attorney and Sanders's attorney time to confer with their clients about their decisions. (R. 78:4–5.)

When the hearing resumed, Hansen entered a guilty plea. (R. 78:5.) The court engaged in a plea colloquy with Hansen and accepted his plea. (R. 78:5–12.)

After that, the court asked Sanders's attorney how Sanders wished to proceed; counsel explained Sanders wanted to go to trial. (R. 78:14.) The court discussed the State's plea offer. (R. 78:14–16.)

Defense counsel then stated: "I just want to put on the record that we did get the statement from Mr. Westmoreland yesterday, and that is the main evidence against my client, and we don't think it's fair to have to make a decision one day after we got the main evidence." (R. 78:16.) Counsel noted he had litigated cases "like this" where the court granted an adjournment. (R. 78:17.)

The court explained it would not do that for a "variety of reasons." (R. 78:17–18.) It indicated the "cost" of plea bargaining is "enormous" where "defendants don't have to decide about a plea until the day of trial"; further, "here the

defendant has perfect knowledge of whether he was involved or not." (R. 78:17–19.) The court explained that it does not allow a defendant to "come in and fish for his plea with a lower deal later or any deal offer at all if it turns out their case is not as strong as they are pretending." (R. 78:18–19.)

The court continued questioning Sanders about the plea offer. (R. 78:19–20.) It asked if he had enough time to talk with his lawyer about his decision, and Sanders said he felt like he was "being forced into trial." (R. 78:20.) The court repeated the question, and he answered, "Not really." (R. 78:20.)

Sanders stated he "just got" his lawyer in January, and he felt they had not had enough time to prepare; the court asked whether his co-defendant's statement was a "surprise," and he answered, "Yes." (R. 78:21.)

The court asked the State whether anything in the co-defendant's statement contained any "factual information which isn't already alleged in the complaint"; the State did not think so "because this was also a surveilled transaction, so most of it was seen." (R. 78:22.)

The court asked Sanders what he wanted to do; he said, "I never even knew anything about this." (R. 78:22.) The court repeated the question, and he answered: "I want to go to trial." (R. 78:22.) The court asked if he had enough time to talk with counsel before making the decision, and he answered, "Yes." (R. 78:22.)

Voir dire. During voir dire, the Stated asked: "Is there anyone here who has had—and I'm not going to pry into details, but anyone here who has had a prior bad experience with law enforcement?" (R. 79:22.)

Three potential jurors responded affirmatively to the question: E.R., J.O., and C.S.[1] (R. 79:22–30; *see also* 16 (juror selection and peremptory challenges sheet)).

The State first asked follow-up questions of E.R.: "Now, again, I indicated I would not pry into details, but what I'm really asking here is whether you your [sic] prior experience with law enforcement would affect your ability to be fair in this case." (R. 79:23.) E.R. answered, "Yes." (R. 79:23.)

The State asked whether that meant she would "count the testimony of law enforcement officers as less credible than other witnesses, or is there some other way where you think your ability to be fair would be affected?" (R. 79:23.)

She answered that she has "an issue with the police. I have been pulled over for driving in the wrong area, so my perception might be skewed." (R. 79:23.) She said she would believe law enforcement to be less credible. (R. 79:23.) She nevertheless believed she could be fair, but she reiterated that she did not "feel comfortable" with it all. (R. 79:23–24.)

When the State asked J.O. whether he believed he could be fair given his prior experience, he answered "No." (R. 79:25.) The State asked if he could evaluate the evidence in a fair way, and he answered, "Honestly, no." (R. 79:25.)

The State moved to strike J.O., and the court asked him questions. (R. 79:25.) It asked why he thought he would be unable to be fair, and he answered, "Personal reasons." (R. 79:25–26.) J.O. stated that he "had a run-in when [he] was 16 with a cop" who "threatened to beat [his] head in." (R. 79:26–27.) The court asked if he believed all police are

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[1] The State refers to these potential jurors by their initials to protect their privacy.

like that, and he answered, "I don't know. I just don't trust them." (R. 79:26–27.)

The court asked whether J.O. would suggest the system only have juries consisting of people who have good experiences with police, and he answered, "No." (R. 79:27.) The court asked whether it should have any reason to think J.O. would be "any less likely to be fair to both sides than anyone else," and he said: "Possibly. I'm just stuck in my ways right now." (R. 79:28.) The court denied the State's motion to strike J.O. from the panel for cause. (R. 79:28.)

The State then asked C.S. "whether [he] can listen to the evidence and evaluate it fairly." (R. 79:28.) He answered: "Honestly, I'm not sure." (R. 79:28.) He elaborated that "it would probably bubble up feelings of stuff that has happened to [him] in the past . . . just being racially profiled in the past." (R. 79:28–29.) He did not know "how that would come up in this case," but he had been "pulled over without just cause" "several times." (R. 79:28–29.)

The State asked whether he thought he would be less able to be fair than anyone else, and he answered: "Right now I don't think so. I mean, I'm saying I think I can be fair, but I'm just letting you know, you know, that has happened to me." (R. 79:29.) The State noted it appreciated his honesty. (R. 79:29.)

The court asked C.S. and J.O. (1) if the evidence satisfied them beyond a reasonable doubt that the defendant committed the crimes, would they be able to vote guilty?; and (2) if the evidence did not meet that burden, could they vote not guilty? (R. 79:29.) C.S. answered yes to both questions. (R. 79:29.) J.O. said yes to the "second question," and "[p]ossibly" to the first. (R. 79:29–30.) The court noted it needed a yes or no, and J.O. answered "Yes." (R. 79:30.)

Voir dire continued. (R. 79:30–44.) Among other questions, defense counsel asked whether anyone would be

more inclined to believe a police officer "just because he is a police officer"; no prospective juror responded affirmatively. (R. 79:42.)

The parties submitted their five peremptory strikes. (*See* R. 16.) The State struck E.R., J.O., C.S., and two other potential jurors. (R. 79:46.) Defense counsel objected to the State striking E.R. and C.S. because they "are both black." (R. 79:45–46.) Though not explicitly addressed, the record reflects that Sanders is also black. (R. 1:1 ("Sex/Race: M/B"); *see also* 79:49 (circuit court discussing the "foul" "stereotype that blacks are going to be more likely to acquit a black defendant").)

Following defense counsel's objection, the court asked the State for its reasons for striking E.R. and C.S. (R. 79:46.) The State explained it struck them, and J.O., because of their prior bad experiences with law enforcement and the indication that those experiences could affect their view of the testimony:

> Both of those individuals expressed having prior bad experiences with the police, and although in the end they indicated they could be fair, they were quite hesitant and seemed to express feelings based upon their personal experiences of not trusting law enforcement and maybe looking more skeptically at law enforcement testimony than other witnesses, and that is the reason they were struck, which is also consistent with [J.O.].

(R. 79:46.)

Defense counsel responded that C.S. "never expressed any hesitancy" and asserted that the "very idea of why we need the black people on the jury, because they are the ones who are harassed, you know, by the police." (R. 79:46.)

The court interjected: "We don't need them because they are black, we need them because they are Americans." (R. 79:46.) Counsel responded, "We need them because they

represent a cross-section of society, and if we exclude the black people because they have had bad experiences with police . . . we will only have white people who haven't had bad experiences with the police." (R. 79:47.)

Defense counsel cited *Batson*[2] (R. 79:47); counsel did not make, nor does Sanders raise on appeal, any claim of systematic exclusion of African-Americans from jury pools in Kenosha County.

The court explained that the "State has to offer a race neutral explanation that isn't off the wall. It can't just be a camouflage." (R. 79:47.) The court concluded the State's reasoning was not just "camouflage": "I don't think they've done that here, and the jurors came forward and acknowledged that they had experiences that caused them to be feeling that the police had ill-treated them, and that is not a sentiment exclusively held by blacks." (R. 79:47.)

The court noted that, J.O., who is not African-American, was the "most adamant" of the three about the effects of his prior negative experiences with law enforcement: "There are plenty of white people, and [J.O.], he was actually the most adamant of the three in my estimation, and he had the hardest time coming forward with a statement that he could vote to convict if the evidence was there." (R. 79:47.)

The court explained that while, in the end, all three "indicated a willingness to be fair," "[t]hat doesn't mean that the district attorney has to accept that they would be ideal jurors for the State." (R. 79:48.)

The court explained that looking at "this whole panel," it did not think it was "off the wall" for the prosecutor to

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

have selected E.R. and C.S. as two of the five to strike. (R. 79:48.)

> I don't think there is any reason for me to conclude it's because they are black. It may be that derivatively they have had bad experiences because they are black, but they are not being excluded now because that they [sic] are black, at least not—they have given a race neutral explanation.

(R. 79:48.)

The court also explained that it does not like to "stereotype that all black jurors are going to vote the same way." (R. 79:48.) "The district attorney cannot purposefully exclude people on the basis of the color of their skin, and I don't see evidence to show that they have, so motion is denied." (R. 79:49.)

Defense counsel argued the prosecutor has a "higher bar" "when she excludes a black person as opposed to excluding somebody else," and noted "if she excludes these two black people, there won't be any black people on the jury." (R. 79:49.)

The court indicated that while that was perhaps "not the most desirable situation from a community standpoint," it was "not suggestive of any kind of discrimination." (R. 79:49.) Where the State had a "legitimate objection" to jurors, the court found "no reason" to "force the district attorney to keep that person on the jury just to make sure that the race identity of the jury is protected." (R. 79:49–50.) Neither E.R., C.S., nor J.O. served on the jury. (*See* R. 79:50.)

The jury trial. At trial, the State presented recordings, photos, testimony from multiple law enforcement officers, testimony from the informant who purchased the heroin, and the testimony of co-defendant Westmoreland, to prove Sanders's role in the heroin deliveries. (R. 79:82; 80:1–126.)

Prior to the State calling its last witness (a detective), defense counsel noted that Sanders wanted to make a statement. (R. 80:74–75.) Sanders stated he felt he had not been "represented properly"—that his attorney was not asking the questions he felt should have been asked. (R. 80:75.) He stated that his attorney took a long time to ask questions, and he noted that even the court had commented on the speed of counsel's questioning. (R. 80:76.) Sanders asserted that the court denied a defense request for an adjournment, and he felt like he did not have enough time to prepare. (R. 80:75.)

The court responded that it did not recall denying an adjournment, other than defense counsel's discussion of the trial he had later in the week. (R. 80:76.) The court also noted it did not believe 60 days was a "short time" to prepare. (R. 80:76–77.) The court explained it had not seen anything "obvious" in terms of problems with Sanders's attorney's performance. (R. 80:77.) It confirmed that counsel was sometimes slow to ask questions, but the court explained that did not necessarily mean a lack of preparation; the court said it felt the same about the prosecutor. (R. 80:77–78.)

The court explained: "We are well underway, and so I think unless you give me some specific reason, there is no chance that I would end this trial at this point." (R. 80:79.)

Sanders said he "figured as much" but "just wanted to put it on record." (R. 80:79.) He noted that he was "facing a lot of time," and the court had a reputation for being "harsh." (R. 80:80.) He said he felt like the jury was going to side with the State. (R. 80:80.)

The court explained it was not going to keep the jury beyond the following day; the court did not know whether defense counsel still had the other trial, but it was not going to "extend this case." (R. 80:82.)

The court then indicated another possibility: "The only way I would let your case go to another day—and this is for practical reasons—is if you waive jury trial. Then I'll decide, and I'm the one you are afraid to death of, and I understand that." (R. 80:82.)

The court explained it was "not trying to coax" him into doing that, and the "district attorney would have to consent," but that "is the only way that [it] could extend your case to another day if the DA could finish the presentation down the line and it didn't prejudice them." (R. 80:82–83.)

In that situation, the court explained, it could put his "case off for a few weeks," and he could sit down with current counsel "or with whomever you want and try to make different plans in terms of progress of the case." (R. 80:83.)

The court reiterated that the State would have to agree to this proposition. (R. 80:83.) It asked the State if it would agree. (R. 80:83.) The State explained this was a "bizarre situation" and it was "not entirely sure what that even means." (R. 80:83.) It asked whether the court meant it would start the trial over, and the court said no. (R. 80:83.) The court said that under this proposal, it would "continue the trial at a later date without a jury." (R. 80:83–84.)

The State was unsure how this would address Sanders's concerns about how his attorney questioned the witnesses, as the State only had one witness left. (R. 80:84.) The court noted Sanders could "theoretically" "recall the witnesses as part of his own case." (R. 80:84.) The State explained that it would try to protect the case from ineffectiveness, but it had not seen any ineffectiveness, so it was "not inclined to set this out and waive the jury." (R. 80:84.)

The court allowed Sanders and defense counsel to talk privately. (R. 80:84.) Defense counsel then advised, and

Sanders confirmed, that Sanders wanted to keep going with the jury trial. (R. 80:84–85.)

The court and parties continued to discuss trial matters, and Sanders interjected that he was "confused" and felt like he was "already guilty." (R. 80:88.) He reasserted that his attorney was not "fighting" for him "properly." (R. 80:88.) The court noted it was "sorry" Sanders was "unhappy," but it would not "delay [the trial] any longer." (R. 80:91–92.)

The court began its colloquy with Sanders as to whether he wished to testify, and Sanders said he felt like he was just "screwing [himself] worse here." (R. 80:93.) He decided not to testify. (R. 80:94.) He reiterated that he did not feel his attorney was representing him properly. (R. 80:95.)

The State called its last witness. (R. 80:96.) The defense did not present any evidence. (R. 80:126.) The jury found Sanders guilty of both counts. (R. 40–41; 81:12.)

At sentencing, Sanders stated he made "two horrible mistakes." (R. 82:10.) On the first count, the court imposed a bifurcated prison sentence of 12 years of initial confinement followed by 6 years of extended supervision; on the second count, the court withheld sentence and placed Sanders on probation for 5 years, consecutive to the first sentence. (R. 51; 82:10, 22–23.)

Sanders did not file a Wis. Stat. § (Rule) 809.30 postconviction motion.

Sanders appeals.

ARGUMENT

I. The circuit court's findings—that the prosecutor did not strike the two African-American panelists for a racially discriminatory purpose—are not clearly erroneous.

A. Standard of review

"Wisconsin law is in accord with the U.S. Supreme Court, holding that discriminatory intent is a question of historical fact, and the clearly erroneous standard of review applies at each step of the *Batson* analysis." *State v. Lamon*, 2003 WI 78, ¶ 45, 262 Wis. 2d 747, 664 N.W.2d 607.

B. Legal principles

The Equal Protection Clause of the United States Constitution forbids prosecutors from striking potential jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

"[T]he Equal Protection Clause is not violated simply because there is a racially discriminatory or a disparate impact." *Lamon*, 262 Wis. 2d 747, ¶ 34. *Batson* also "does not require that African-American defendants have African-American jurors." *State v. Gregory*, 2001 WI App 107, ¶ 12, 244 Wis. 2d 65, 630 N.W.2d 711.

Wisconsin has adopted the three-step *Batson* analysis to determine whether a prosecutor's peremptory strikes violated the Equal Protection Clause. *Lamon*, 262 Wis. 2d 747, ¶¶ 22, 27.

First, "the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race." *Hernandez v. New York*, 500 U.S. 352, 358 (1991) (citing *Batson*, 476 U.S. at 96–97).

To meet this prima facie burden, the defendant must show that (a) he is a member of a cognizable group and the

prosecutor has exercised peremptory strikes to remove members of his race from the venire, and (b) "the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race." *Lamon*, 262 Wis. 2d 747, ¶ 28. The 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." *Id.*

Second, if the defendant meets this showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors. *Hernandez*, 500 U.S. at 358–59 (citing *Batson*, 476 U.S. at 97–98). On review, even if the defendant did not meet his initial prima facie burden, if the prosecutor offered her race-neutral reasons for striking the jurors, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 359.

Third, the circuit court "must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359 (citing *Batson*, 476 U.S. at 98).

Courts consider the "persuasiveness and plausibility of the prosecutor's reasons," and "the defendant 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." *Lamon*, 262 Wis. 2d 747, ¶ 32. For example, striking a black panelist for reasons that apply "just as well to an otherwise-similar nonblack who is permitted to serve," is evidence tending to prove purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

The "trial court judge is in the best position to determine the credibility of the state's race-neutral explanations," so this Court gives "great deference" to that ruling. *Lamon*, 262 Wis. 2d 747, ¶ 42.

A fact-finding is clearly erroneous if "it is against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted). "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417. Thus, "[w]here multiple inferences are possible from credible evidence, [this Court] must accept those drawn by the trial court." *State v. Lopez*, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992).

C. The circuit court's *Batson* findings are not clearly erroneous.

The circuit court's fact-findings, rejecting Sanders's *Batson* challenge, are not clearly erroneous. The most direct evidence?: the State also struck J.O., who is *not* black, for the same reason it struck the two black prospective jurors—negative experiences with law enforcement that may affect an ability to fairly consider law enforcement witnesses. (*See* R. 79:46.)

Just as a prosecutor striking a black panelist for a reason equally applicable to a non-black juror it did not strike would suggest purposeful discrimination, *see Miller-El*, 545 U.S. at 241, so too is the inverse true here. Specifically, it was reasonable—in no way clearly erroneous—for the court to conclude that the prosecutor striking E.R. and C.S. was not "camouflage" for race, in part because the prosecutor also struck a non-black juror for the same reason. (R. 79:47.)

Though the circuit court never explicitly held that Sanders met his prima facie burden to show that the prosecutor exercised peremptory challenges based on race (the first step of the *Batson* analysis), *see Hernandez*, 500 U.S. at 358, the court asked the prosecutor for her

reasoning, and the prosecutor provided it. (R. 79:46–50.) Pursuant to *Hernandez*, the question of whether Sanders met his prima facie burden is therefore moot. *Hernandez*, 500 U.S. at 359.

Additionally, Sanders acknowledges that "step two" is not "at issue," because the State articulated a race-neutral reason for striking the panelists. (Sanders's Br. 6 (citing *Hernandez*, 500 U.S. at 363)).

Turning, therefore, to the third step in the analysis, Sanders cannot show that the circuit court's findings that he did not "carr[y] his burden of proving purposeful discrimination," are clearly erroneous. *Hernandez*, 500 U.S. at 359.

The court heard the jurors, heard the prosecutor's explanations, noted the fact that the prosecutor also struck a non-black juror for the same articulated reasons, and reasonably concluded that E.R. and C.S. were not being excluded because of their race. (*See* R. 79:48.) The court soundly found "no reason" to "force the district attorney" to keep E.R. and C.S. on the jury "just to make sure that the race identity of the jury is protected." (R. 79:49–50.) Indeed, *Batson* "does not require that African-American defendants have African-American jurors." *Gregory*, 244 Wis. 2d 65, ¶ 12.

Sanders nevertheless argues that the State "did not tell the court below" "that both of the black jurors' reason [sic] for their bad experiences with police was they had been pulled over for the non-existent crime of Driving While Black." (Sanders's Br. 7.) He argues that because only black people can experience "Driving While Black," the court's findings were clearly erroneous. (Sanders's Br. 7.)

As an initial matter, the State does not understand Sanders's assertion that it withheld information from the "court below," given that it (a) asked the questions in voir

dire *before* the court below, and (b) argued in opposition to the *Batson* challenge *to* the court below.

Moreover, Sanders's underlying argument about "Driving While Black"—his only argument on appeal as to why this Court should deem the circuit court's findings clearly erroneous—also fails.

The prosecutor did not ask whether any of the panelists believed they had been pulled over for "Driving While Black." The prosecutor asked if anyone had "a prior bad experience with law enforcement." (R. 79:22.) This distinction is critical under *Batson*.

As the Wisconsin Supreme Court has explained, the Equal Protection Clause "is not violated simply because there is a racially discriminatory or a disparate *impact*." *Lamon*, 262 Wis. 2d 747, ¶ 34 (emphasis added). Instead, the question before the circuit court was whether Sanders proved that the State *purposefully* discriminated against the black potential jurors based on their race. *Hernandez*, 500 U.S. at 359.

As the circuit court here properly reasoned, the fact that many African-Americans have had negative experiences with law enforcement does not mean feeling "ill-treated" by police is a "sentiment held exclusively" by African-Americans. (R. 79:47.)

Thus, it was not clearly erroneous for the court to conclude that the prosecutor did not purposefully discriminate against the black panelists by asking a question to *all* jurors about negative experiences with law enforcement and striking *all* jurors (both black and not black) who indicated having such experiences.

Consider, for example, the Seventh Circuit's decision in *United States v. Carter*, 111 F.3d 509 (7th Cir. 1997). One of the prospective jurors, a black woman who lived with her boyfriend—a police officer—indicated that she disagreed

with her boyfriend because she is "'very pro-black' [and] he is 'just the opposite' and sometimes [ ] justifies arrests due to a suspect's being black." *Id.* at 511. She also discussed her own negative experience with police. *Id.* at 512. She nevertheless did not believe her negative experiences would affect her role as a juror. *Id.*

The prosecutor moved to strike that juror based on her disagreements with her police-officer boyfriend, her "pro-black" statement, and her "prior negative experiences with law enforcement officers." *Carter*, 111 F.3d at 512. The district court rejected the defendant's *Batson* challenge, concluding that the prosecutor did not strike her for a racially discriminatory purpose. *Id.*

The Seventh Circuit affirmed. It explained: "*Batson* does not prevent consideration of a potential juror's own admitted prejudices just because the potential juror and the defendant are of the same race." *Id.* at 513; *see also, e.g.*, *Edwards v. Roper*, 688 F.3d 449, 454–55 (8th Cir. 2012) (affirming a potential juror's distrust of law enforcement as a race-neutral basis to strike); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire By Questionnaire and the "Blind" Peremptory*, 29 U. Mich. J.L. Ref. 981, 991 (1996) ("After *Batson* . . . assuming no showing of pretext to discriminate against black jury panelists . . . litigants lawfully may exclude panelists who have had negative experiences with law enforcement officers, even if that means excluding all black jury panelists.").

The circuit court—in the best position to determine the credibility of the State's race-neutral explanations, *Lamon*, 262 Wis. 2d 747, ¶ 42—reasonably concluded that the prosecutor did not strike the African-American jurors for a racially discriminatory purpose. The fact that Sanders disagrees with the circuit court's findings does not render those findings clearly erroneous. *Wenk*, 248 Wis. 2d 714, ¶ 8. This Court should affirm.

II. The circuit court did not deprive Sanders of his right to counsel by denying an adjournment of the final pre-trial hearing.

A. Standards of review

This Court considers independently whether a party forfeited an argument. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702.

Whether to grant an adjournment lies within the circuit court's discretion, and this Court will not disturb the circuit court's discretion unless it was erroneously exercised. *State v. Leighton*, 2000 WI App 156, ¶ 27, 237 Wis. 2d 709, 616 N.W.2d 126.

Sanders broadly asserts that "[r]ight to counsel issues are reviewed *de novo*." (Sanders's Br. 8.) While recognizing that a denial of an adjournment may potentially implicate the Sixth Amendment right to counsel, Wisconsin appellate courts have nevertheless repeatedly held that the standard of review is whether the court erroneously exercised (or abused) its discretion. *See, e.g.*, *State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979); *State v. Wedgeworth*, 100 Wis. 2d 514, 520, 302 N.W.2d 810 (1981); *State v. Fink*, 195 Wis. 2d 330, 338, 536 N.W.2d 401 (1995).

B. Legal principles

One of the fundamental principles of Wisconsin postconviction and appellate law is our "waiver rule"; it encompasses both waiver and forfeiture principles and holds that issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. This rule is an "essential principle of the orderly administration of justice," as it provides the parties and courts with notice and a fair

opportunity to address the claim, encourages attorney diligence, and prevents "sandbagging." *Id.* ¶ 12.

This Court has further recognized that "[c]onstitutional claims are very complicated from an analytic perspective, both to brief and decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal." *Cemetery Servs., Inc. v. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). Otherwise, this Court would have to serve "as both advocate and court." *Id.* Similarly, this Court need not address undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

A circuit court has discretion to grant or deny an adjournment request. *Leighton*, 237 Wis. 2d 709, ¶ 27. Because the denial of a continuance "may raise questions relative to a defendant's sixth amendment right to counsel and fourteenth amendment right to due process of law," on review, this Court's task "is to balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice." *Id.* (quoting *Fink*, 195 Wis. 2d at 338). "[P]robing appellate scrutiny of a decision to deny a continuance is not warranted." *Id.* (citation omitted).

When analyzing a circuit court's denial of a continuance of a trial date based on "surprise" evidence, this Court has explained that three qualifications "must be met" before it will hold that the circuit court erred in denying the request. *Fink*, 195 Wis. 2d at 339; *see also Angus v. State*, 76 Wis. 2d 191, 196, 251 N.W.2d 28 (1977).

First, "there must have been actual surprise which could not have been foreseen"; second, "where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that

contradictory or impeaching evidence could properly be obtained within a reasonable time"; and third, "the denial of the continuance must have been, in fact, prejudicial to the party who sought it." *Fink*, 195 Wis. 2d at 339–40 (citing *Angus*, 76 Wis. 2d at 196).

C. The court did not deprive Sanders of his right to counsel by not adjourning the final pre-trial hearing.

Without any development, Sanders argues that the circuit court denied his right to counsel (not the effective assistance of counsel, but counsel entirely) because it did not grant an adjournment to allow him more time "to confer with counsel during plea negotiations." (Sanders's Br. 9.) His argument: (1) is forfeited, (2) is undeveloped, and (3) fails on its merits.

First, Sanders forfeited his constitutional deprivation of counsel argument because he did not raise it in the circuit court. When the court denied defense counsel's request for an adjournment to allow Sanders more time to make a decision after receiving Westmoreland's statement, defense counsel simply argued that he did not think it was "fair." (R. 78:16.)

Defense counsel did not argue that denying Sanders more time to make a decision would deprive him of his constitutional right to counsel. (*See generally* R. 78.) He made no mention of any constitutional challenge. (*See generally* R. 78.) And Sanders filed no postconviction motion raising ineffective assistance of counsel for failure to make this argument or any other argument. His argument that the court deprived him of his constitutional right to counsel is therefore forfeited. *Huebner*, 235 Wis. 2d 486. This Court need not go further.

But if this Court wishes to go further, his new constitutional argument is also undeveloped. Sanders notes

that all criminal defendants have the right to counsel, that "pretrial is a critical stage," and that defendants have a right to counsel during plea negotiations. (Sanders's Br. 8–9.) He cites cases to support these general principles. (Sanders's Br. 8–9.) Lastly, without any further explanation, he asserts that the court "denied Mr. Sanders his right to confer with counsel" by denying the adjournment of the pre-trial hearing. (Sanders's Br. 8–9.) How?

Sanders's perfunctory argument raising the "specter" of a constitutional claim is "insufficient to constitute a valid appeal." *Cemetery Servs., Inc.*, 221 Wis. 2d at 831.

The same is true of his claim that, if the court did not allow him sufficient time to consult with counsel, the error would be structural. (*See* Sanders's Br. 8–9.) While the "*complete denial* of the right to counsel" has been recognized as a structural error, *State v. Pinno*, 2014 WI 74, ¶ 50, 356 Wis. 2d 106, 850 N.W.2d 207 (emphasis added), Sanders had counsel before, during, and after the pre-trial hearing, and the court specifically allowed him time to consult with counsel during the final pre-trial hearing. (R. 78:4–5.) How, from that, Sanders believes he was deprived of counsel or suffered any harm, remains unclear.

This Court should not serve as both "advocate and court." *Cemetery Servs., Inc.*, 221 Wis. 2d at 831. Sanders's constitutional challenge is undeveloped. *See Pettit*, 171 Wis. 2d at 646–47. This Court need not go further.

But even if this Court does wish to address his argument on its merits, it still fails. It still fails for the simple reason that the court *did* allow Sanders to consult with his attorney during the final pre-trial hearing. (R. 78:4–5.) It also fails because, though he at first indicated otherwise, Sanders ultimately advised the court that he *did* have enough time to discuss his decision with counsel. (R. 78:22.)

Sanders points to nothing to explain why the time allotted was insufficient for him to consult with his attorney. Sanders points to nothing to explain why this Court should now find a constitutional deprivation of the right to counsel when he told the circuit court he had enough time to consult with counsel. Sanders points to nothing to suggest that the court had any obligation to grant his preferred amount of time to make a decision, particularly where the court—months earlier—advised him that it would not allow plea negotiations after the final pre-trial hearing. (*See* R. 75:3.)

Moreover, though this case presents a slightly different posture (here, denial of a request for an adjournment of a pre-trial hearing to decide whether to accept a plea offer, as opposed to denial of adjournment of the trial), consider Sanders's argument through the *Fink* requirements for an adjournment for "surprise" evidence:

First, though Sanders asserted Westmoreland's statement was a surprise to him (R. 78:21), the complaint specifically named Westmoreland and Hansen as co-defendants and described their respective roles. (R. 1.) Given that the complaint also mentioned that police worked with a confidential informant, watched the drug transactions occur, and had recordings of the transactions (R. 1), it does not seem surprising that at least one of the co-defendants may decide to provide a statement to police. This "surprise" could have been reasonably foreseen. *Fink*, 195 Wis. 2d at 339–40.

Second, Sanders never made any sort of showing that "contradictory or impeaching evidence" could have been obtained in a reasonable time to rebut Westmoreland. *Fink*, 195 Wis. 2d at 339–40. The defense never even indicated that they wished to do additional investigation or speak to witnesses. Defense counsel just indicated it was unfair to not give Sanders more time to "make a decision." (R. 78:16.)

Third, Sanders never established any sort of prejudice from the denial of the continuance. *Fink*, 195 Wis. 2d at 339–40. As the State noted, "this was also a surveilled transaction." (R. 78:22.) Sanders failed and still fails to explain why Westmoreland's statement would have made the difference to his decision, given all of the other evidence against him.

In short, Sanders cannot show deprivation of counsel, where he consulted with counsel and failed to show that additional time would have made any difference. *See Fink*, 195 Wis. 2d at 339.

Lastly, contrast the facts of this case with those of the Sixth Circuit's decision in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), which Sanders (without development) cites for support. (Sanders's Br. 9.) There, the Sixth Circuit granted habeas relief, holding that the defendant was denied his right to counsel at a "critical stage in the proceedings." *Mitchell*, 325 F.3d at 748. Why? Because the "undisputed record" established that "counsel never consulted with [the defendant] and he was completely unrepresented during the entire month prior to his trial" for second-degree murder. *Id.*

Here, on the other hand, Sanders was represented by counsel during the entirety of the proceedings, the court warned Sanders months earlier that it would not allow plea negotiations after the final pre-trial hearing, and the court allowed Sanders time to privately consult with counsel during the final pre-trial hearing. Sanders fails to show any deprivation of his right to counsel, and this Court should affirm.

III. The circuit court did not force Sanders to choose between his rights to a jury trial and the effective assistance counsel.

A. Standard of review

As noted, this Court considers independently whether a party forfeited an argument. *Kaczmarski*, 320 Wis. 2d 811, ¶ 7.

Whether a defendant's right to jury trial has been violated presents a constitutional issue; appellate courts review it de novo but benefit from any analysis below. *State v. Smith*, 2012 WI 91, ¶ 25, 342 Wis. 2d 710, 817 N.W.2d 410.

B. Legal principles

The legal principles concerning forfeiture and undeveloped arguments, set forth in Section II.B., *supra*, also apply here.

In *Simmons v. United States*, 390 U.S. 377 (1968), the Supreme Court addressed a situation where, to litigate a Fourth Amendment claim, a defendant had to testify and his testimony was then used against him at trial. *Id.* at 394. Thus, in effect, his assertion of his Fourth Amendment rights waived his Fifth Amendment privilege against self-incrimination. *Id.* at 394. The Supreme Court explained: "[i]n these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.*

Since *Simmons*, the Supreme Court has clarified that the Constitution does not always prohibit a defendant from having to choose between constitutional options: "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California*, 402 U.S. 183, 213

(1971), *vacated on other grounds by Crampton v. Ohio*, 408 U.S. 941 (1972); *see also State v. Schultz*, 152 Wis. 2d 408, 422, 488 N.W.2d 424 (1989). Instead, "the threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* (citation omitted).

C. The court contemplating allowing the jury trial to continue as a bench trial, if both Sanders *and* the State agreed, did not impermissibly force Sanders to choose between his constitutional rights.

Without any development, Sanders also argues that the court's possible idea of an adjourned jury trial and, instead, a bench trial denied him due process by forcing him to choose between his right to a jury trial and the effective assistance of counsel. (Sanders's Br. 9–11.) Here again, his argument: (1) is forfeited, (2) is undeveloped, and (3) fails on its merits.

First, Sanders made no contemporaneous argument to the circuit court that its possible offer (contingent on the State's agreement) violated due process. (*See generally* R. 80.) Indeed, neither defense counsel nor Sanders himself either (a) directly requested an adjournment or (b) objected to the court's possible offer. (*See generally* R. 80.) On top of all of that, Sanders filed no postconviction motion asserting ineffective assistance of counsel for failing to raise this argument or any argument. His argument is forfeited. *Huebner*, 235 Wis. 2d 486. This Court need not go further.

But if it wishes to do so, here too Sanders fails to develop his new argument on appeal. He cites *Simmons*, 390 U.S. 377, for the general principle that a defendant should not have to surrender one constitutional right for another, notes that other jurisdictions have applied *Simmons* in

"different contexts," and argues that this Court should apply that principle here. (Sanders's Br. 10–11.)

His entire application of those principles to this case: "Forcing Mr. Sanders to choose between his right to counsel and his right to jury trial was equally as, if not more so, intolerable as in *Simmons* and its progeny." (Sanders's Br. 10–11.) Why?

This perfunctory argument raising the "specter" of a due process violation is "insufficient to constitute a valid appeal." *Cemetery Servs., Inc.*, 221 Wis. 2d at 831.

The same is true, again, of his claim that any error would be structural. He broadly asserts that "[e]rror affecting the right to a jury trial is structural" (Sanders's Br. 11), but he fails to explain how or why he was deprived of the right to a jury trial when he *had* a jury trial. This Court should reject this argument as undeveloped. *See Pettit*, 171 Wis. 2d at 646–47.

Third, even if this Court concludes his new argument is not forfeited and is sufficiently developed to address, it still fails on its merits. The court did not force Sanders to give up his right to a jury trial—he had a jury trial. The court did not force Sanders to give up his right to counsel—he had counsel. Indeed, the court did not force Sanders to do anything.

Instead, it offered a possible alternative avenue for Sanders, given his mid-trial lamentations about his attorney's performance. Importantly, it did not even definitely offer this approach to Sanders; it repeatedly made clear that such a change in course would also require the State's approval. (R. 80:82–83). And the State made clear that it was "not inclined" to agree. (R. 80:84.)

Sanders of course had no constitutional right to the court adjourning the jury trial mid-way and continuing it as a bench trial. Sanders cannot show he was denied any

constitutional right by the court offering him something to which he was not entitled. *See, e.g.*, *State v. Alexander*, 2013 WI 70, ¶ 32, 349 Wis. 2d 327, 833 N.W.2d 126 (holding that a defendant's constitutional right to be present at trial was not violated by the court not including him in an in-chambers meeting he had no constitutional right to attend). Sanders himself appeared to recognize that he had no right to a mid-trial adjournment; he instead explained that he just wanted to note his concerns for the record. (R. 80:79.)

Nor has Sanders made *any* showing whatsoever that he received the ineffective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 689–94 (1984) (proving ineffective assistance of counsel requires a defendant to show both that counsel performed deficiently and that the deficient performance prejudiced the outcome of his case).

Consider the dramatic ramifications of accepting Sanders's argument: accepting that Sanders was forced to choose between his jury trial right and his right to the effective assistance of counsel would require this Court to *agree* that Sanders was indeed being denied the effective assistance of trial counsel. To do so would require this court to accept Sanders's general mid-trial lamentations about his attorney as proof of ineffective assistance of counsel.

Doing so would ignore *Strickland* and undermine Wisconsin's procedure mandating *Machner* hearings to assess claims of ineffective assistance. *Strickland*, 466 U.S. at 689–94; *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (*Machner* hearing preserving the testimony of trial counsel is a "prerequisite to a claim of ineffective representation on appeal"). More generally, how could a court assess the prejudice of any purported trial deficiency if the trial has not yet concluded?

It would also put circuit courts in the untenable position of having to adjourn jury trials or find some other mid-trial resolution if a defendant expresses discontent with his lawyer. This cannot be.

Sanders has failed to show that the circuit court's possible alternative approach (which Sanders did not accept) forced him to choose between his right to a jury trial and the effective assistance of counsel. His claim fails, and this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 28th day of December, 2018.

Respectfully submitted,

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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 8,477 words.

Dated this 28th day of December, 2018.

_____
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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 28th day of December, 2018.

_____
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