STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1639-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK D. ZOLLIECOFFER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM S. POCAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF THE ISSUES

1. Whether the circuit court properly denied Defendant-Appellant Patrick D. Zolliecoffer's motion to substitute counsel and corresponding motion to adjourn the trial?

The circuit court said yes.

This Court should say yes.

2. Whether the circuit court properly denied Zolliecoffer's *Batson* challenge to two of the State's peremptory strikes?

The circuit court said yes.

This Court should say no and remand the case for a *Batson* hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Zolliecoffer was argumentative and disruptive at his child support hearing, causing to two sheriff's deputies to detain him. Zolliecoffer resisted their efforts, which prompted the charges and convictions—disorderly conduct, battery to a law enforcement officer, and attempted disarming of a peace officer—underlying this appeal.

Zolliecoffer seeks a new trial based on (1) the circuit court's denial of his eleventh-hour motion to substitute counsel and (2) the circuit court's denial of his *Batson* challenge to two of the State's peremptory strikes.

Zolliecoffer is not entitled to a new trial on either ground. The record amply supports the court's discretionary decision on the substitution motion. As for the *Batson* challenge, Zolliecoffer is entitled to relief on this claim, but not a new trial. The trial court never applied the *Batson* factors and accordingly never made the factual determinations it was required to make. Accordingly, this Court should remand to the circuit court for a hearing on the *Batson* challenge.

STATEMENT OF THE CASE

In September 2016, the State charged Zolliecoffer with disorderly conduct, battery to a police officer, and attempting to disarm the officer. (R. 1; 2.) Zolliecoffer, represented by appointed counsel, had a trial scheduled for March 2017. (R. 53:2; 54:9.)

In February 2017, Zolliecoffer began to enter a guilty plea, but he changed his mind. (R. 54:3–8.) Counsel then asked the court for more time to find witnesses, which resulted in the court postponing the trial until late April 2017. (R. 54:9–17.) But counsel moved to withdraw, citing a breakdown in communication. (R. 15; 55:2–3.) The court told Zolliecoffer it was "inclined to grant" counsel's motion to withdraw, but it wanted Zolliecoffer to understand that it would not "allow multiple change of attorneys." (R. 55:3.) The court warned Zolliecoffer that his new appointed attorney, "whether [he] like[d] them or not or get along with them or not, is going to be [his] last attorney in this case short of something very unusual occurring." (R. 55:3–4.) Zolliecoffer confirmed that, despite the court's admonitions, he wanted new counsel. (R. 55:4–5.) After Zolliecoffer received new counsel, the court scheduled the trial for late May. (R. 17; 56:2–5; 57:4.)

On the Friday before the Monday when the trial was set to begin, Zolliecoffer again moved to substitute attorneys.

(R. 17; 58.) At the hearing on Zolliecoffer's request, the court learned that Zolliecoffer had retained Attorney Thomas Flanagan two days earlier. (R. 58:3–4.) But Flanagan told the court that he was not prepared to try the case on Monday. (R. 58:4.) Flanagan asked the court to let him represent Zolliecoffer, but that the court adjourn the case to allow him to "look in to" whether there was additional evidence. (R. 58:3–7.) Zolliecoffer did not address the court. (R. 58:10.)

The court said that if Flanagan could try the case on the date scheduled for trial, it "would be inclined to grant the request, because it doesn't really matter . . . who tries this case." (R. 58:10.) But the case had been pending for eight months and it concerned the court that Zolliecoffer's request was "for the purpose of delay." (R. 58:10–11.)

The case proceeded to trial. (R. 59; 60; 61; 62.) Race was a significant topic during voir dire and trial. (R. 59; 62.) Zolliecoffer's defense was that he was unfairly targeted by the Milwaukee County sheriff's deputies because he was black. (R. 60:63.)

After the jury was chosen, Zolliecoffer challenged the State's use of peremptory strikes on two African-American jurors, which resulted in an all-white jury. (R. 60:44.) Zolliecoffer argued the State had violated *Batson*.

The court told Zolliecoffer that his invocation of *Batson* was misplaced because *Batson* concerned challenges to the whole jury pool. (R. 60:44–45.) And the State agreed. (R. 60:45.) Zolliecoffer pointed the State to the specific jurors that he objected to the State striking, but the State denied that it had struck them based on their race. (R. 60:45–46.)

The court continued to tell Zolliecoffer that *Batson* did not apply to his claim, concluding that "no legal arguments have been made why" the strikes were improper "[s]o then there is . . . no action for the Court to take." (R. 60:46–47.)

The jury convicted Zolliecoffer of the charges against him and the court imposed a three-year term of probation. (R. 37.) Zolliecoffer appeals. (R. 48.)

ARGUMENT

I. The circuit court soundly exercised its discretion in denying Zolliecoffer's eleventh hour motion to substitute counsel.

A. Standard of review and relevant law.

"[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989). An appellate court "independently reviews whether deprivation of a constitutional right has occurred." *State v. Jones*, 2010 WI 72, ¶ 23, 326 Wis. 2d 380, 797 N.W.2d 378.

But "a defendant has only a presumptive right to employ his or her chosen counsel." *State v. Prineas*, 2009 WI App 28, ¶ 14, 316 Wis. 2d 414, 766 N.W.2d 206. A trial court has discretion to decide motions that relate to the *substitution* of counsel. *Wheat v. United States*, 486 U.S. 153, 162–64 (1988).

In exercising its discretion, the trial court should consider the length of the delay the defendant has requested, whether there is counsel ready to try the case, whether there have been previous delays, convenience or lack thereof to the parties and witnesses, whether the delay seems legitimate or dilatory, as well as other relevant factors. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). Considering these factors "balances the defendant's constitutional right to

counsel against societal interest in the prompt and efficient administration of justice." *Id.*

"In evaluating whether a trial court's denial of a motion for substitution of counsel is an [erroneous exercise] of discretion, a reviewing court must consider a number of factors." *Id.* at 359. These include the sufficiency of the court's inquiry into the defendant's issue, the timeliness of the motion, and whether the conflict between the defendant and counsel was so significant that it was likely that they could not communicate to the extent that prevented an adequate defense. *Id.*

B. Because substitute counsel was unable to proceed to trial on the scheduled date, the circuit court properly exercised its discretion in denying Zolliecoffer's motion for substitution.

In September 2016, the State charged Zolliecoffer with the charges for which he was convicted in this case. (R. 1; 2.) In November 2016, the court scheduled the jury trial for January 2017. (R. 7.) But shortly thereafter, Zolliecoffer's counsel moved to withdraw because he had taken another job that precluded him from continuing to represent Zolliecoffer. (R. 8.) Zolliecoffer was appointed new counsel and the trial was rescheduled for March 1, 2017. (R. 53:2; 54:9.)

On the date scheduled for the final pretrial hearing, Zolliecoffer told the court that he was going to enter a guilty plea. (R. 54:3–4.) But during the colloquy, Zolliecoffer reversed course and decided that he wanted to proceed to trial after all. (R. 54:9.) The court, "All right, that's perfectly fine, trial, he wishes a trial he shall have, so let's go ahead and then have our normal pretrial. This matter will stay on the calendar for trial next week on March 1st." (R. 54:9.) But Zolliecoffer's counsel told the court that he needed more time to allow him to find witnesses he had been having difficulty

tracking down. (R. 54:10–16.) The court agreed to postpone the trial again, but it told counsel that it doubted that it would grant an additional continuance. (R. 54:16.) The court scheduled the trial for April 26, 2017. (R. 54:17.)

The next day, counsel moved to withdraw, citing a breakdown in communication. (R. 15.) At a hearing on the motion, the court acknowledged that although counsel was technically Zolliecoffer's second attorney on this case, it would treat him as the first attorney. (R. 55:2–3.) Because counsel was effectively Zolliecoffer's first attorney, the court told Zolliecoffer it was "inclined to grant" his motion to withdraw, but it wanted Zolliecoffer to understand that it would not "allow multiple change of attorneys." (R. 55:3.) The court warned Zolliecoffer that his new appointed attorney, "whether [he] like[d] them or not or get along with them or not, is going to be [his] last attorney in this case short of something very unusual occurring." (R. 55:3–4.) The court emphasized,

> Because I don't allow multiple switching of attorneys that at that point, I am either going to determine you're one (1) of those people that is just not going to be happy with whomever is appointed, or it is just simply for the purpose of delay.
>
> I'm not saying that that is what is occurring now.
>
> But I just want to warn you, because Mr. Gaertner is a good attorney.
>
> I realize even with good attorneys, sometimes there's, for whatever reason, a particular attorney and client don't mesh well.
>
> But I just want to make sure we had this discussion.
>
> Because if this issue comes with your next attorney, if I grant your request, most likely, my answer next time will be, no.

(R. 55:4.)

The court then asked Zolliecoffer if, given what he had just heard, he still wanted counsel to withdraw and have a new attorney appointed for him. (R. 55:4–5.) Because Zolliecoffer confirmed that that was what he wanted, the court granted counsel's motion to withdraw. (R. 55:5.) After Zolliecoffer received new counsel and the case was removed from the trial calendar for a period of time, the court scheduled the trial for late May. (R. 17; 56:2–5; 57:4.)

On the Friday before the Monday when the trial was set to begin, Zolliecoffer again moved to switch attorneys. (R. 17; 58.) At the hearing on Zolliecoffer's request, the court learned that Zolliecoffer had retained Attorney Thomas Flanagan two days earlier. (R. 58:3–4.) But Flanagan told the court that he thought the trial date was the date scheduled for the final pretrial and he was not prepared to try the case in just a few days. (R. 58:4.) Flanagan told the court that Zolliecoffer told him that "his communication with current counsel, they have not been able to communicate very well" and that he had wanted to retain counsel earlier, but he had not secured the funds to do it until that week. (R. 58:4–5.) Flanagan asked the court to let him represent Zolliecoffer, but that the court adjourn the case to allow him to "look in to" whether there was additional evidence. (R. 58:3–7.) Zolliecoffer did not address the court. (R. 58:10.)

The court said that if Flanagan could try the case on the date scheduled for trial, it "would be inclined to grant the request, because it doesn't really matter . . . who tries the case." (R. 58:10.) But the case had been pending for eight months and it concerned the court that Zolliecoffer's request was "for the purpose of delay." (R. 58:10–11.) And because the court had granted a previous adjournment made on Zolliecoffer's behalf, as well as his earlier motion for substitution, the court denied the motion. (R. 58:11.) The court suggested that if the case did not proceed to trial on

time—for whatever reasons—Zolliecoffer could renew his motion "[b]ecause, honestly, [it] really do[es]n't care who tries the case." (R. 58:11–12.)

The court's reasoning demonstrates a proper exercise of its discretion. *See Lomax*, 146 Wis. 2d at 360 (stating that the trial court should consider the length of the delay the defendant has requested, whether there is counsel ready to try the case, whether there have been previous delays, convenience or lack thereof to the parties and witnesses, whether the delay seems legitimate or dilatory, as well as other relevant factors). Here, the trial court considered the appropriate factors—including that Zolliecoffer had received previous adjournments and the case had been idling for eight months, that the request appeared for dilatory reasons, and that the motion was made on the near-eve of trial. *See id.* at 360.

And this Court should affirm the circuit court's exercise of discretion. *See id.* at 359 (this Court reviews the sufficiency of the court's inquiry into the defendant's issue, the timeliness of the motion, and whether the conflict between the defendant and counsel was so significant that it was likely that they could not communicate to the extent that prevented an adequate defense). The court's inquiry into Zolliecoffer's request was thorough. *See id.* It heard from Flanagan and allowed Zolliecoffer an opportunity to explain why he wanted to substitute counsel at the late hour, but Zolliecoffer declined to offer a reason. *See id.* Zolliecoffer made the motion at nearly the last moment before trial. *See id.* While Flanagan explained that the timing was so because Zolliecoffer lacked the funds to retain him earlier, Zolliecoffer offered no reason why he wanted Flanagan to represent him instead of appointed counsel, he made no claim that he had a significant conflict with appointed counsel, and he made no claim that appointed counsel could not provide him an adequate defense. *See id.*

In sum, because a decision to grant or deny substitution is within a court's discretion, Zolliecoffer must show that the court erroneously exercised that discretion. But Zolliecoffer offered no compelling reason—indeed no reason—why he should be allowed to substitute for the second time at the eleventh hour. Without a compelling reason, and with a request that appeared to be made only for tactical reasons, the court was well within its discretion to deny Zollicoffer's motion.

Zolliecoffer calls the circuit court's decision arbitrary, relying heavily on *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008) for persuasive support.[1] But *Carlson* is distinguishable.

In *Carlson*, Carlson's case was set for trial approximately three months after his arraignment. *Carlson*, 526 F.3d at 1020. Shortly before the scheduled date for trial, Carlson's relationship with his attorney, Randall Kaiser, broke down. *Id.* Carlson hired another lawyer, Robin Shellow, and Kaiser moved to withdraw. *Id.* Four days before the trial was scheduled to begin, Carlson moved to substitute Shellow, provided that the court granted Shellow a continuance so that she could prepare for the trial. *Id.*

On the day before trial, the court held a hearing on the motions. *Id.* at 1021. Kaiser told the court that he was in "a very tough position" were the court not to allow him to withdraw, pointing to a complete breakdown in communication with Carlson. *Id.* Kaiser also pointed out that this was Carlson's first request for new counsel, Carlson would remain in custody during any adjournment, and that his motion was not for the purpose of unnecessary delay. *Id.*

Shellow told the court that "the case involved factual issues that Kaiser had not explored and constitutional issues that he had not researched." *Id.* She pointed to specific issues

[1] Zolliecoffer's Br. 20–25.

that she wanted to investigate and examine. *Id.* But the court denied the motions because Shellow was not prepared to try the case the next day. *Id.* at 1021–22.

The next day, before the trial started, Carlson addressed the court, saying that his relationship with Kaiser was strained and difficult. *Id.* at 1022. Carlson said, "I have tried on numerous occasions to convey my concerns with Mr. Kaiser, to no avail." *Id.* But the court dismissed Carlson's pleas, telling him that he and Kaiser just had different views of the case. *Id.* Kaiser then addressed the judge, "imploring him to allow the substitution." *Id.* Kaiser again told the court that he and Carlson had a "total breakdown in communication" and that a short adjournment was warranted. *Id.* The court again denied the motion. *Id.*

In addressing whether the trial court[2] properly denied Carlson's motion, the Seventh Circuit noted that "motions for substitution of retained counsel and for a continuance can implicate both the Sixth Amendment right to counsel of choice and the Fourteenth Amendment right to due process of law." *Id.* at 1025. Both Amendments prohibit courts from denying defendants' motions on these grounds arbitrarily and unreasonably. *Id.* at 1024.

The Seventh Circuit concluded that the trial court's finding that the attorney-client relationship was not broken was "clearly unreasonable." *Id.* The court also rejected the trial court's reliance on its calendar and the timing of

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[2] *Carlson* came before the Seventh Circuit on Wisconsin's appeal from the United States District Court's granting of Carlson's petition for habeas corpus relief under 28 U.S.C. § 2254. *Carlson v. Jess*, 526 F. 3d 1018, 1023–24 (7th Cir. 2008). Thus, the question before the Seventh Circuit was whether the district court properly concluded that the Wisconsin Court of Appeals' decision affirming Carlson's conviction was unreasonable. *See id.* But the court's recitation of the facts and its view of the State trial court's findings remain persuasive.

Carlson's request as "far from compelling" reasons to deny Carlson his choice of counsel. *Id.* at 1025–26. And the court found that "Carlson was obviously not seeking to delay the trial unnecessarily" because he had to remain in custody. *Id.* at 1026. The court also noted that the motion may have been filed close to the trial date, but the charges had also been pending only a short time. *Id.* Thus, the court found the trial court's reasons to deny Carlson's motion for a continuance unconvincing. *Id.*

In contrast, here, Zolliecoffer offered no evidence of a breakdown in communication with his counsel. Flanagan mentioned that Zolliecoffer and counsel may "have not been able to communicate very well," but neither counsel nor Zolliecoffer mentioned any difficulties they were having. (R. 58:4.) Thus, the court had no reason to believe that there was any difficulty in the attorney-client relationship that warranted substitution.

In addition, unlike in *Carlson*, this was not Zolliecoffer's first delay or first substitution. And Zolliecoffer raised his request for substitution on the last working day before the trial, after his case had been pending for eight months, and after other adjournments and a previous substitution had been granted. Not surprisingly, this led the trial court to specifically comment that his motion appeared to be for the purpose of delaying the trial.

Zolliecoffer also uses *Carlson* to persuade this Court that the circuit court's concern about delay was "rigid," "inflexible," and "highly arbitrary."[3] But the *Carlson* court's concern with the trial court's "rigidity" in that case does not apply here. *See Carlson*, 526 F.3d at 1026. As shown, the *Carlson* trial court seemed unfalteringly set against any substitution or delay. *Id.* But here, Zolliecoffer had already

[3] Zolliecoffer's Br. 21, 23.

been allowed a substitution and an accompanying delay. It is of no import that his second motion for substitution was for retained counsel.[4] He had already successfully moved for substitution. It was within the court's discretion whether to grant his second motion. *Id.* at 1025. Because—unlike in *Carlson*—Zolliecoffer offered no compelling reason in support of his motion for substitution and the circuit court reasonably construed the motion as seeking a tactical delay, the court did not erroneously exercise its discretion in denying the motion. *See Carlson*, 526 F.3d at 1026–27.

For these reasons, the trial court's decision stands in contrast to the trial court's decision in *Carlson* because it was well-reasoned, supported by the record, and far from arbitrary.

II. The circuit court failed to apply *Batson*; thus, this Court should remand the case for a hearing.

The State takes no position on the ultimate merits of Zolliecoffer's *Batson* claim because the record is insufficient to do so. After Zolliecoffer raised a *Batson* challenge to the State's use of its peremptory strikes, the circuit court declined to apply the three-step *Batson* procedure, telling Zolliecoffer that he was employing the wrong law in support of his claim. The State concedes that the circuit court's response to Zolliecoffer's challenge was wrong. As a result, the State asks this Court to remand the case to the circuit court to hold a *Batson* hearing.

A. Standard of review and relevant law.

A peremptory challenge allows a party to strike a potential juror from the panel without stating a reason. *State v. Lamon*, 2003 WI 78, ¶ 23, 262 Wis. 2d 747, 664 N.W.2d 607. But the Equal Protection Clause prohibits the State from

[4] Zolliecoffer's Br. 21.

striking a potential juror solely because of his or her race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

The *Batson* Court developed a three-step process to determine if the State violated the Equal Protection Clause with its peremptory challenges. *Lamon*, 262 Wis. 2d 747, ¶ 27. First, the defendant must make a prima facie showing that the State exercised a peremptory challenge on the basis of race. *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If the defendant makes that showing, then the State must give a race-neutral basis for its decision to strike the juror. *Id.* at 476–77. And then third, the court must decide whether the defendant showed that the State's discrimination was purposeful. *Id.* at 477. "As part of this third step, a defendant may show that the reasons proffered by the State are pretexts for racial discrimination." *Lamon*, 262 Wis. 2d 747, ¶ 32.

"On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 477.

B. Here, the court did not engage in the required three-part *Batson* process

Both counsel queried the prospective jurors about race during voir dire. The State told the panel, "The defendant is African-American. The prosecutor is African-American. The defendant's attorney is Caucasian. The judge is Caucasian. . . . My question is, Does any of that matter to any of you at all?" (R. 60:5.) The State explained, "The reason why I ask that question is because sometimes people do have biases or prejudices based on race." (R. 60:6.)

Zolliecoffer's counsel also discussed race. (R. 60:19.) Counsel told the panel, "People are sensitive to being called racist and at the same time people are sensitive to being perceived, as we say, playing the race card." (R. 60:19.) Counsel proceeded to ask the panel members several questions concerning their views on the public perception of

black men and how black men are treated by police. (R. 60:20–24.)

After the jury was chosen, Zolliecoffer challenged two of the State's peremptory strikes as violating *Batson*. (R. 60:44.) Zolliecoffer said that "[a]ll three African-American jurors on the panel were struck," and though he conceded that one was eliminated for cause, he maintained that the State struck the other two because of their race. (R. 60:44.)

The court told Zolliecoffer that he misunderstood *Batson*. (R. 60:44–45.) According to the court, *Batson* concerned challenges to jury pools, not challenges to peremptory strikes. (R. 60:44–45.) The State agreed, saying, "Every time that challenge has been brought up in the past it has always had to do with the jury panel." (R. 60:45.) The State further responded that it had not taken notes on "who is African-American and who wasn't." (R. 60:45.)

But Zolliecoffer pointed the State specifically to Jurors 1 and 21, both of whom were African-American and both of whom the State struck, which resulted in no African-American jurors remaining on the final panel. (R. 60:45.) The State offered the following explanation for its strikes,

> As far as Juror No. 1, I had concerns about her ability to understand. Perhaps communicate, but that was one of my weaker strikes. Then No. 21 that came down to having zero children and maybe not understanding, you know, the things that go into child support hearings all of that being a parent. Plus she had no jury experience. Plus a factor was that she indicated she knew people in law enforcement, and she had no criminal justice -- she had no criminal justice contacts. So definitely with respect to those two it had nothing to do with their race.

(R. 60:45–46.)

Zolliecoffer countered that the State's explanations were not plausible because several other jurors whom the State had not moved to strike were childless and without jury

experience. (R. 60:46.) And the State admitted its explanation for striking Juror 1 was weak. (R. 60:46.)

But the court disagreed with Zolliecoffer that his challenge to the State's use of peremptory strikes was proper under *Batson*. (R. 60:46.) The court asked Zolliecoffer, "Do you have legal -- other legal arguments? It is not [a] *Batson* [claim, which] would be to the panel. If you have legal authority you want me to consider, I will." (R. 60:46.) Zolliecoffer told the court he would rest on his argument. (R. 60:46.) The court then concluded, "Then no legal arguments have been made why the striking of Jurors 1 and 21 was in any way improper. So then there is nothing no action for the Court to take." (R. 60:46–47.)

Zolliecoffer asserts that the circuit court's response to his *Batson* claim "was superficially insufficient."[5] Zolliecoffer says that the court "appeared unfamiliar with the controlling case law," denying his "motion in a summary fashion."[6] Because the court failed to apply *Batson*, Zolliecoffer claims this Court owes the circuit court's decision no deference.[7]

To start, the circuit court made no credibility or weight determinations, nor any decision, so there is nothing for this Court to not defer to. Despite Zolliecoffer's assertion that the circuit court found "non-discrimination," the court specifically said that "there is . . . no action for the Court to take."[8] (R. 60:47.) The court simply failed to apply the law.

That said, the State admits that the circuit court was wrong when it told Zolliecoffer that *Batson* does not concern a

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[5] Zolliecoffer's Br. 33.

[6] Zolliecoffer's Br. 33.

[7] Zolliecoffer's Br. 33.

[8] Zolliecoffer's Br. 41.

challenge to the State's use of its peremptory strikes.[9] It is black-letter law that a defendant challenging the State's use of peremptory strikes as discriminatory must raise a *Batson* claim. *See Lamon*, 262 Wis. 2d 747, ¶ 27.

Yet Zolliecoffer is incorrect that the only appropriate remedy to cure the trial court's error is a new trial.[10] Here, because the circuit court failed to apply the law to Zolliecoffer's claim, the proper remedy is to remand to conduct a *Batson* analysis. *See State v. Cole*, 2008 WI App 178, ¶ 43, 315 Wis. 2d 75, 762 N.W.2d 711 (stating that when the trial court applied the wrong burden of proof, the remedy is to remand the case to the court with instructions to apply the proper burden).

And that remedy is appropriate in the context of this Batson challenge under the circumstances here. For example, in *Lamon*, although the court upheld the trial court's decision denying the defendant's *Batson* claim, the dissent suggested that when a trial court errs in its application of the three-step process, remand is the proper avenue. *See Lamon*, 262 Wis. 2d 747, ¶ 129 (Abrahamson, C.J., dissenting). Because "the circuit court has a duty to explore all of the relevant facts and make a finding about discrimination," its failure to do so resulted in a misapplication of *Batson*. *Id.* ¶¶ 128–29 (Abrahamson, C.J., dissenting). And when the circuit court fails to apply the law properly, the cure is to remand the case for the court to conduct the proper *Batson* analysis. *Id.* ¶ 129 (Abrahamson, C.J., dissenting).

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[9] The State assumes that the circuit court mistook *Batson* for the Supreme Court line of cases that establish that the Sixth Amendment compels a petit jury must be drawn from a representative cross-section of the community. *See Taylor v. Lousiana*, 419 U.S. 522, 528–29 (1975).

[10] Zolliecoffer's Br. 40–42.

Here, the circuit court failed to recognize that it should employ the three-step *Batson* process. *See Lamon*, 262 Wis. 2d 747, ¶ 27. In fact, it said that *Batson* did not apply. So, instead of acknowledging that Zolliecoffer was attempting to make a prima facie showing of racial bias and determining whether Zolliecoffer satisfied that burden, and instead of then informing the State that it bore the burden to rebut that showing with race-neutral reasons, the court simply told Zolliecoffer that *Batson* was inapplicable. Accordingly, even though Zolliecoffer raised an appropriate challenge and the State made some remarks in response, the record is not sufficient to allow this Court to conclude that the circuit court applied the first two *Batson* prongs.

And even if this Court were to find that the circuit court's cursory treatment of Zolliecoffer's claim satisfied the first two steps of *Batson*, there is no dispute that the court failed to engage in the third step and to make the credibility findings necessary for this Court to assess the *Batson* claim. The court wholly failed to "weigh the credibility of the testimony and determine whether purposeful discrimination ha[d] been established." *Lamon*, 262 Wis. 2d 747, ¶ 32. And the court gave Zolliecoffer no opportunity—as required by *Batson*—to "show that the reasons proffered by the State are pretexts for racial discrimination." *Id.*

Because it is Zolliecoffer's burden to persuade the circuit court "that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination,"[11] and the circuit court failed to afford him this opportunity, the Court should remand the case for the limited purpose of a hearing on his *Batson* claim. This remedy would give the parties the opportunity to have the circuit court apply the correct law to Zolliecoffer's challenges.

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[11] *State v. Lamon*, 2003 WI 78, ¶ 32, 262 Wis. 2d 747, 664 N.W.2d 607.

If, as the dissent wrote in *Lamon*, "the circuit court determines, after the hearing, that there was no purposeful discrimination based on race, the conviction should be affirmed. If it determines that there was purposeful discrimination, the required remedy would be a reversal of the conviction and a new trial." *Id.* ¶ 129.

To be sure, the dissent in *Lamon* carries only persuasive weight. But the State invokes the dissent solely on the well-established point that remand is the correct remedy when the circuit court fails its duty to make necessary factual findings and fails to apply the correct law. *See Cole*, 315 Wis. 2d 75, ¶ 43; *State v. Flynn*, 190 Wis. 2d 31, 51, 527 N.W.2d 343 (Ct. App. 1994). And in any event, the disagreement between the dissent in *Lamon* and the majority was not the propriety of remand, but whether the circuit court correctly applied the merits on the third *Batson* prong.

Given the lack of record development on Zolliecoffer's *Batson* claim, this Court should remand to allow the circuit court to make required credibility determinations, to allow the parties an opportunity to satisfy their burdens, and to allow the circuit court an opportunity to apply the *Batson* factors.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Zolliecoffer relief on his claim related to substitution of counsel, but the Court remand the case to the circuit court for a hearing on his *Batson* claim.

Date this 7th day of February, 2019.

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 5,198 words.

Dated this 7th day of February, 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 7th day of February, 2019.

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