

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017 AP 000860 CR
Fond du Lac County Circuit Court Case Nos. 2016CT000153

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRAD L. CONGER,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF
CONVICTION AND IN FOND DU LAC COUNTY, THE
HONORABLE GARY R. SHARPE, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-
APPELLANT BRAD L. CONGER

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STATEMENT OF THE ISSUES

Did the trial court err when it refused to strike Juror S.B. for cause where Juror S.B. sat on a case one week prior with similar facts, identical theory of defense and the same defense attorney, and where she equivocated as to whether the prior week's case would affect her decision in the current case?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Brad L. Conger, (Mr. Conger) was charged in the County of Fond du Lac, with having operated a motor vehicle while under the influence of an intoxicant contrary to Wis. Stat. §346.63(1)(a) and with having operated a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat §346.63(1)(b) on February 20, 2016. A jury trial was held on February 14, 2017. The jury found Mr. Conger not guilty of operating a motor vehicle while under the influence of an intoxicant, but found him guilty of operating a motor vehicle with a prohibited alcohol concentration.

A sentencing hearing was held on March 7, 2017, where the Court, the Honorable Gary R. Sharpe, Judge, Fond du Lac County Circuit Court, presiding, sentenced Mr. Conger. On that same date, the defendant filed a Petition to Stay Penalties Pending Appeal, and timely filed a Notice of Intent to Pursue Post Conviction relief. The court granted Mr. Conger's Petition to Stay Penalties. On May 4, 2017, Mr. Conger timely filed a Notice of Appeal.

Facts in support of this appeal were adduced at the jury trial held on February 14, 2017. The pertinent facts relate to the

Court refusing to strike for cause Juror Suzanne Bubolz (Juror S.B.).

During voir dire, the court conducted individual voir dire on three jurors (Juror S.B., Juror R.S. and Juror E.S.). Each of these three jurors sat on a case with very similar facts, theory of defense and the same defense counsel as one week prior to the commencement of Mr. Conger's case. During that individual voir dire, the Court advised each juror that the reason for the individual voir dire was because they sat on a case "last week very similar to this jury with the same defense attorney, and the case involved operating while intoxicated, and the case involved a test result very similar to the test result you will hear today." (R.34:36/App.10). In the previous case, the jury, under similar facts, found that defendant not guilty of operating a motor vehicle while under the influence of an intoxicant, but guilty of operating a motor vehicle with a prohibited alcohol concentration. (R.34:29/App.3). Defense counsel questioned Juror S.B. on the previous week's verdict, and whether Juror S.B. felt the test result being over the legal limit should be enough to establish guilt. (R.34:29/App.3). Juror S.B. implied that if the test is properly taken and showed an alcohol concentration over the limit, then that would be enough to

convict, she stated “[i]f the blood went to the right place at the right time, there isn’t much you can do to fight the alcohol.” (R.34:29/App.3). Defense counsel attempted to follow up to determine if Juror S.B. would hold the State to their burden of establishing the alcohol concentration at the time of driving, but the Court cut off defense counsel’s question. (R.34:30/App.4). The Court then informed Juror S.B.:

THE COURT: ...the similar kinds of arguments are going to be made about the actual differences between when the person was driving and when the test occurred, the dissipation and/or absorption of alcohol into the bloodstream...(R.34:30-31/App.)

Subsequently, the court asked:

THE COURT: Do you think you can consider all of those factors all new in this case based upon the facts you hear in this case without just saying, well, you heard all of this last week, and I’m going to make my decision like I did last week? That’s, I guess, essentially, what we are asking you today.

Juror S.B.: I will try to do the best I can without considering what happened last week.” (R.34:31/App. 5).

Defense counsel then asked if Juror S.B. would reject the curve defense simply because of the prior week’s trial, and Juror S.B. indicated “this is a different case.” *Id.* District Attorney Toney then question her about how she would reconcile

different information about absorption with the prior week's trial, and she said "It wouldn't affect my decision if that's what you mean, I guess I don't--" Defense counsel moved to strike Juror S.B. for cause. (R.34:33/App.7). The court denied Mr. Conger's motion to strike Juror S.B. for cause, (R.34:33-36/App.7-10) finding Juror S.B. open and willing to separate the prior week's trial from Mr. Conger's trial. *Id.*

Defense counsel did not strike Juror S.B., and she was seated as a juror. Similar to the prior week's trial, the jury returned a verdict of not guilty on the operating a motor vehicle while under the influence of an intoxicant case, but guilty on the operating a motor vehicle with a prohibited alcohol concentration case. A Judgment of Conviction was entered on March 7, 2017. Mr. Conger timely filed a Notice of Appeal on May 5, 2017.

STANDARD OF REVIEW

When reviewing the circuit court's decision denying a motion to strike a prospective juror for subjective bias, the reviewing court should "uphold the trial court's factual findings that a prospective juror is or is not subjectively biased unless it is clearly erroneous." *State v. Faucher*, 227 Wis.2d 700, 596 N.W.2d 770 (1999). This is because the trial court is in the "superior position to assess the demeanor and disposition of prospective jurors." *State v. Lepsch*, 2017 WI 27, ¶23, 374 Wis.2d 98, 892 N.W.2d 682. The standard of review in reviewing whether a juror was objectively biased is that the reviewing court "gives weight to the circuit court's conclusions that a prospective juror is or is not objectively biased", and will reverse only "if as a matter of law a reasonable court could not have reached such a conclusion." *State v. Kiernan*, 227 Wis.2d 736, at 745, 596 N.W. 760 (1999) citing to *Faucher*, at 720.

ARGUMENT

BECAUSE SHE HAD ONE WEEK PRIOR SAT ON A CASE WITH SIMILAR FACTS, A SIMILAR THEORY OF DEFENSE AND THE SAME DEFENSE COUNSEL AND WHERE SHE STATED DURING VOIR DIRE, SHE WOULD ONLY TRY TO DO HER BEST IN NOT CONSIDERING THE PRIOR WEEK'S TRIAL, THE COURT ERRED WHEN IT REFUSED TO STRIKE JUROR S.B. FOR CAUSE.

An accused has the right to have an impartial jury decide his fate. Both the United States (U.S. Const. amends. VI and XIV) and the Wisconsin Constitution (Wis. Const. art. I, §7) guarantee such rights. “To be impartial, a juror must be indifferent and capable of basing her verdict upon the evidence developed at trial.” *State v. Faucher*, 227 Wis.2d 700, 715, 596 N.W.2d 770 (1999). Jurors are presumed impartial, and the accused bears the burden of proving bias. *State v. Lepsch*, 2017 WI 27, ¶22, 374 Wis.2d 98, 892 N.W.2d 682. The three types of bias recognized by Wisconsin courts are (1) statutory, (2) subjective and (3) objective bias. *Id.* It is well established that Wisconsin appellate courts have “cautioned and encouraged the circuit courts to strike prospective jurors for cause when the circuit courts’ ‘reasonably suspect’ juror bias exists.” *State v. Lindell*, 2001 WI 108, ¶49, 245 Wis.2d 689, 629 N.W.2d 223. Even if an appellate court would not reverse a trial court’s decision not to strike a prospective juror, trial courts should err on the side of caution. *Id.*

Because Juror S.B. exhibited both subjective and objective bias, the trial court refusal to strike Juror S.B. was clearly erroneous. The trial court erred in failing to strike her for cause. In determining if a juror exhibited subjective bias, the

court must inquire as to “whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have.” *Kiernan* at 744, citing to *State v. Ferron*, 219 Wis.2d 481, at 498, 579 N.W.2d 654 (1998). Subjective bias refers to “bias that is revealed through the words and the demeanor of the prospective juror.” *Faucher*, 227 Wis.2d at 717, 596 N.W.2d 770.

Objective bias “inquires whether a ‘reasonable person in the juror’s position could set aside the opinion or prior knowledge.” *Ferron*, at 498. The theory behind objective bias is that “in some circumstances, bias can be detected “from facts and circumstances surrounding the ... juror’s answers” notwithstanding a juror’s statement to the effect that the juror can and will be impartial.” *Kiernan*, at 745.

Here, Juror S.B.’s answers during individual voir dire clearly demonstrate her subjective as well as objective bias. The week prior to Mr. Conger’s jury trial, Juror S.B. sat on a case with very similar facts to those herein. As can be gleaned from voir dire, the prior week’s case dealt with virtually the same issues present in Mr. Conger’s case. The cases were similar in terms of the blood alcohol level, the theory of defense (blood

alcohol curve), and the arguments that were presented. (R.34:27/App.1).

When questioned regarding her ability to decide Mr. Conger's case on the facts only in his case, Juror S.B. did not say yes she could, she equivocated and said she would try to do "the best [she] can without considering what happened last week." (R.34:31/App.5). The prior week's jury rejected the blood alcohol curve defense, finding defendant not guilty of the OWI charge, but guilty of the PAC charge. (R.34:29/App.3). Juror S.B. did not express a sincere willingness to set aside the prior knowledge and opinion that she had from her previous jury service. Her answer was equivocal, she simply agreed to try her best. Because Juror S.B. did not express a sincere willingness to set aside her prior knowledge and opinion, she was subjectively biased, and should have been struck for cause.

Not only did Juror S.B.'s answers reveal subjective bias, but they also revealed that Juror S.B. was objectively biased. "The concept of objective bias relates to the question of whether a reasonable person in the individual prospective juror's position could be impartial." *Lepsch* at ¶24. Here, Juror S.B. had already rejected virtually the same defense one week prior. Furthermore, her response to questions regarding the test result showed that

she would again reject the blood alcohol curve defense. She specifically stated that she felt, “if the blood went to the right place at the right time, there isn’t much you can do to fight the alcohol.” (R.34:29/App.3). Her answer revealed her unwillingness to consider a curve defense (the exact defense that she rejected one week prior.). Based on these answers it is apparent that a reasonable person in Juror S.B.’s position could not have been fair and impartial. Because of the above, in addition to subjective bias, objective bias is preset, and Juror S.B., should have been struck for cause. The trial court should have erred on the side of caution and struck Juror S.B. The refusal to strike Juror S.B. was clearly erroneous.

CONCLUSION

Because Juror S.B. was subjectively and objectively biased, the trial court should have granted Mr. Conger's motion to strike Juror S.B. for cause. Thus, the trial court erred in failing to strike Juror S.B. The Court should reverse the Judgment of Conviction and remand for a new trial.

Dated this 18th day of July, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 17 pages. The word count is 3272.

Dated this 18th day of July, 2017.

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**CERTIFICATION 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 s. 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 18th day of July, 2017.

Respectfully submitted,

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of July, 2017.

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APPENDIX