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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017 AP 000860 CR
Fond du Lac County Circuit Court Case No. 16 CT 153

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRAD L. CONGER,

Defendant-Appellant.

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

THE BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT,
STATE OF WISCONSIN

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- 1) Did the trial court err when it did not strike Juror S.B. for cause?

Trial Court Answered: No.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal is within Wis. Stat. §752.31(2) and is not eligible for publication pursuant to Wis. Stat. §809.23(1)b(4). The State is not requesting oral argument, as this matter involves only the application of well-settled law to the facts of the case.

III. STATEMENT OF THE CASE

On February 14, 2017 this case proceeded to Jury Trial before the Honorable Gary R. Sharpe, of the Fond du Lac County Circuit Court Br. IV. (R.39:4/R.App.1). Early in the proceedings, counsel for Mr. Conger alerted the trial court to the concern of jurors who sat on a prior trial with the same attorney the week prior and their ability to serve on another jury without bias. (R.39:9/R.App.2). Ultimately the trial court identified a procedure to inquire with prospective jurors about their experience on the prior case (R.39:16/R.App.3). This procedure would entail bringing the

former jurors into the privacy of the jury deliberation room to make specific inquiry with each juror. *Id.*

Jurors were then brought into the courtroom and a generalized overview of the process of juror selection was provided by the trial court. (R.39:18-19/R.App.4-5). The trial court identified three jurors that had served on the jury the week prior. (R.39:30-31/A.App.4-5). During inquiry with prospective jurors, the trial court exercised discretion in striking four jurors for cause. (R.39:29,33,37,39/A.App.3,7/R.App.6,7). Of note, none of these strikes were prompted by motion of either party.

To inquire with the jurors from the prior week's trial the trial court adjourned to a different setting. (R.39:41/R.App.8). Juror S.B. was the first prospective juror to be questioned in this setting. *Id.* During inquiry from the trial court, Juror S.B. understood the importance of the proceedings against Mr. Conger, noting "this is very serious charges". (R.39:42/R.App.9). Juror S.B. agreed to do her best to listen to the testimony, and not be swayed by what occurred in the prior trial. *Id.* Juror S.B. agreed to follow the instructions as given to her by the court, even if they were the same instructions as the prior case. (R.39:43-44/R.App.10-11). Juror S.B. again reaffirmed to the trial court that she would do her best

“without considering what happened last week”. (R.39:45-46/R.App.12-13). Juror S.B. further noted that this case was different, and information learned in the other case would not affect her decision in the present case. (R.39:46-47/R.App.13-14). Juror S.B. also agreed to take other facts into consideration that could influence her decision, specifically food impacting a blood alcohol curve. (R.39:47/R.App.14).

Following questioning of Juror S.B. trial counsel for Mr. Conger moved to strike her for cause. *Id.* The trial court declined to strike Juror S.B. for cause. (R.39:49/R.App.15). The trial court articulated its reasoning for not striking Juror S.B. for cause, to include the following:

- a) Juror S.B. was asked whether she felt she would be compelled to make a similar decision, and the trial court determined that she did not feel that she would make a similar decision (R.39:48/R.App.16).
- b) Juror S.B. agreed to listen to the testimony; *Id.*
- c) Juror S.B. acknowledged it was a different (alcohol) test; *Id.*
- d) Juror S.B. acknowledged a difference between the time the test was taken and the time someone drove; *Id.*

- e) Juror S.B. acknowledged there were influences on a test result based upon what somebody ate and the absorption rate; *Id.*
- f) Juror S.B. expressed an open demeanor, and was not defensive;(R.39:49/R.App.15).
- g) Juror S.B. would listen to all of the testimony; *Id.*
- h) The trial court believed Juror S.B. to be willing to consider arguments of counsel; *Id.*
- i) The trial court believed that Juror S.B. would not simply reject a theory of defense in this case because that theory was rejected the week prior. (R.39:49-51/App.15,17-18).

Upon conclusion of *voir dire*, Juror S.B. was not stricken by either party and remained on the jury. (R.39:72/R.App.19). The jury trial continued, wherein upon conclusion of the trial the jury returned a verdict of guilty to Operating a Motor Vehicle with a Prohibited Alcohol Concentration. (R.39:251/A.App.20). Mr. Conger has filed an appeal requesting a new trial and remand to the trial court. (App. Brief, 10).

IV. ARGUMENT

A. The trial court did not err in denying Mr. Conger’s motion to strike Juror S.B. for cause as Juror S.B. did not present either subjective or objective bias.

The United States Constitution and Wisconsin’s Constitution both guarantee an accused an impartial jury. U.S. Const. amend. VI; Wis. Const. art. 1 § 7. “To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.” *State v. Faucher*, 227 Wis.2d 700, 715, 596 N.W.2d 770 (1999).

“‘Prospective jurors are presumed impartial.’ The party challenging a juror’s impartiality bears the burden of rebutting this presumption and proving bias.” *State v. Funk*, 335 Wis.2d 369,388, 799 N.W.2d 421 (2011)(quoting *State v. Louis*, 156 Wis.2d 470, 478, 457 N.W.2d 484 (1990)). Additionally, “veteran jurors need not be removed for cause when called to decide multiple cases with similar issues and identical witnesses.” *State v. Kiernan*, 227 Wis.2d 736,748, 596 N.W.2d 760, (1999). To remove a “veteran juror” for cause, that juror “must be shown individually to have exhibited bias in the case they are called to hear.” *Id.* at 751. Even more, “[w]hile circuit courts *may* remove jurors to avoid the appearance of

bias, the circuit courts are obligated to remove for cause *only* those jurors who are indeed biased.” *Id.* at 749 n.9 (emphasis added).

Appellate courts give deference to circuit courts’ factual and legal determinations about whether a prospective juror is biased. This is because:

“[L]awyers may ask leading questions on voir dire and because they are also skilled in obtaining desired answers, the responses of a prospective juror to such questions are often contradictory, depending on which party is asking the questions. Thus, on appeal, both parties are usually able to point to voir dire answers that support their competing positions regarding the challenged juror. Given this situation, it is all the more appropriate for [appellate courts] to defer to the trial court's better position to assess the prospective juror's credibility and honesty.” *State v. Jimmie R.R.*, 232 Wis. 2d 138, 154-55, 606 N.W.2d 196 (Ct. App. 1999).

In pursuit of impartial jurors, the Wisconsin Supreme Court has recognized three types of juror bias: (1) statutory, (2) subjective, and (3) objective. *State v. Lepsch*, 374 Wis.2d 98,115, 892 N.W.2d 682. See also *State v. Smith*, 291 Wis.2d 569, 581, 716 N.W.2d 482 (2006) and *Faucher*, 227 Wis.2d at 716.

Mr. Conger asserts that Juror S.B. was subjectively and objectively biased against him. (App. Brief, 6). Mr. Conger states that S.B. was biased against him because she “sat on a case one week prior with similar facts, *identical theory of defense* and the same defense attorney . . . [and]

equivocated as to whether the prior week's case would affect her decision" (App. Brief,iii) (*emphasis added*). Mr. Conger also claims he presented a "blood alcohol curve defense" at trial. (App. Brief, 3,7,9).

The trial court's refusal to strike Juror S.B. for cause was not "clearly erroneous" and was a decision that "a reasonable judge could have reached." *Faucher*, 227 Wis. 2d at 718-21. To assess a prospective juror's potential bias, Wisconsin courts have noted: "it is clear that 'a prospective juror need not respond to voir dire questions with an unequivocal declarations of impartiality.'" *State v. Oswald*, 232 Wis. 2d 103,112, 606 N.W.2d 238 (Ct. App. 1999) (quoting *State v. Erickson*, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999)).

Subjective bias is a question of fact. *Faucher*, 227 Wis. 2d at 718. "Jurors are subjectively biased when they have 'expressed or formed any opinion' about the case prior to hearing the evidence." *Funk*, 335 Wis. 2d at 39. (quoting *Faucher*, 227 Wis. 2d at 717). This bias is "revealed through the words and the demeanor of the prospective juror" and "refers to the prospective juror's state of mind." *Id.* For that reason, "whether a prospective juror is subjectively biased turns on his or her responses on *voir dire* and a circuit court's assessment of the individual's honesty and

credibility, among other relevant factors.” *Id.* at 718. Further, the *Oswald* decision elaborated on nonverbal signals that are perceived by the trial court, stating:

“[I]t is not just the juror’s words that are important. The manner in which the juror says the words and the body language he or she exhibits while answering speak volumes—volumes that are not transmitted to a reviewing court via the cold record. Our inability to review demeanor and thus assess sincerity is precisely why we leave the determination of subjective bias to the circuit court.” 232 Wis. 2d at 110.

Accordingly, “[g]iven the circuit court’s superior position to so assess the demeanor and disposition of prospective jurors,” this Court must “uphold the circuit court’s factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous.” *Faucher*, 227 Wis.2d at 718.

Objective bias is a mixed question of fact and law. *Id.* at 720. A juror is objectively biased “when a reasonable person in the juror’s position could not be impartial.” *Id.* at 718. Whether a juror is objectively biased depends on the “facts and circumstances surrounding the *voir dire* and the facts involved in the case.” *Id.* “The trial court must . . . strike a juror for objective bias if the juror has a direct connection to a dispositive issue in the case, such as the defense theory, coupled with a personal belief regarding the outcome of that issue.” *Oswald*, 232 Wis. 2d at 115.

Juror S.B. was not subjectively biased. Nothing in the *voir dire* proceedings with Juror S.B. would suggest that she maintained any subjective bias. The trial court properly summarized the reasons why Juror S.B. was not subjectively biased, which were supported in the record. (R.39:48/App.22), (R.39:50-51/App.23).

Juror S.B. was also not objectively biased. Similarly, nothing in the *voir dire* proceedings with Juror S.B. would suggest that she maintained an objective bias, as she had no interest in the proceeding or any unique connection to the facts or circumstances of this case to suggest that she could not be fair and impartial. The trial court properly considered these factors in denying Mr. Conger's motion to strike her cause. *Id.*

B. Juror S.B. remaining on the jury panel could not have resulted in any prejudice to Mr. Conger because a blood alcohol curve defense was not advanced by Mr. Conger at trial.

The general prohibition against reversal of a judgment for error or defect in the proceedings is announced in the "harmless error" statute, pursuant to Wis. Stat. §805.18(2). This statute applies to criminal cases. *State v. Dyess*, 124 Wis.2d 525, 547, 370 N.W.2d 222 (1985). The application of a harmless error analysis is instructive and relevant to the

process of jury selection. *State v. Lindell*, 245 Wis.2d 689,730, 629 N.W.2d 223 (2001). See also *State v. Coble*, 100 Wis.2d 179,201-11, 301 N.W.2d 221 (1981).

In assessing a claim of juror bias, the Wisconsin Supreme Court recently took into consideration a harmless error analysis, noting that “the State would bear the burden of establishing that any error was harmless because it stands to benefit from such an error”. *Lepsch*, 374 Wis.2d at 130, see also *State v. Martin*, 343 Wis.2d 278,285 816 N.W.2d 270 (quoting *State v. Harvey*, 254 Wis.2d 442, 465, 647 N.W.2d 189 (2002)). *Lepsch* ultimately failed to demonstrated that his jury was anything less than impartial, any error was determined to be harmless. See 374 Wis.2d at 138.

Contrary to Mr. Conger’s claim, he did not present a blood alcohol curve defense. (See App. Brief, 3,7,9). Firstly, at trial, neither Mr. Conger nor the State presented any evidence about the human body’s ability to absorb or eliminate alcohol from the bloodstream, neither party elicited any testimony regarding retrograde extrapolation, and neither party made any reference to the blood alcohol curve. In fact, Mr. Conger successfully moved to exclude the State’s expert from testifying as to retrograde

extrapolation. (R.39:139-142/App.21-24). Without question, the record is devoid of any expert testimony pertaining to retrograde extrapolation for which an alcohol curve defense could have been based.

Secondly, Mr. Conger himself did not testify as to a drinking history in this case. (R.39:207/R.App.25). No other witnesses were presented by Mr. Conger at trial. *Id.* As a result, no additional information pertaining to Mr. Conger's drinking history, alcohol/dissipation rates, or use of a *Hinz*¹ chart was presented at trial. For those reasons, there was no testimony advanced pertaining to a blood alcohol curve defense.

As a result, even if it were determined that Juror S.B. was somehow biased against the "blood alcohol curve defense," the verdict could not have been prejudicial to Mr. Conger, because the alleged defense theory was not advanced at trial. The impact of Juror S.B. remaining on the jury was, at most, harmless.

¹ See *State v. Hinz*, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984) which provides for use of a standardized blood alcohol concentration chart.

CONCLUSION

For the reasons set forth above, the trial court did not err in denying Mr. Conger's motion to strike Juror S.B. for cause. Further, if any bias is present, the absence of a blood alcohol curve defense at trial resulted in a harmless error from the trial court's failure to strike Juror S.B. As a result, the Court should sustain the Judgment of Conviction and deny Mr. Conger a new jury trial.

Dated this __ day of August, 2017 at Fond du Lac, Wisconsin by:

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages, 2282 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, *other than the appendix material is not included in the electronic version.*

I further 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, at a minimum: (1) a table of contents, (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order of 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 person, 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.

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