COURT OF APPEALS DECISION DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0992-CR

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ANTHONY MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Mark Anthony Mitchell appeals from a judgment entered after a jury convicted him of second-degree sexual assault, party to a crime, contrary to §§ 940.225(2)(d) and 939.05, STATS. Mitchell claims that his conviction should be reversed because the trial court erroneously exercised its discretion when it denied his request to strike a juror for cause. Because Mitchell

failed to make a proper objection and, on the record before us, we cannot conclude that the trial court erroneously exercised its discretion, we reject his claim and affirm the judgment.

I. BACKGROUND

Mitchell was charged with second-degree sexual assault as a party to a crime on the basis that he had encouraged his friend, Robert Bland, to engage in sexual intercourse with Rhonda Fowlkes, Mitchell's girlfriend, while she was lying unconscious in bed. Mitchell pled not guilty and the case was set for a jury trial.

During *voir dire* of the jury, one juror, Ms. M., informed the court that her son was a police officer in Caledonia. Mitchell's attorney asked Juror M. if that fact would affect her ability to judge the case fairly. Juror M. responded: "I am not sure. Put up against test [sic] I would be more inclined to feel that a police officer would be honest because I know what they went through. To get where he is, he went through a lot." Mitchell's attorney asked no additional questions of Juror M., and proceeded to ask general questions of the entire panel regarding whether the prospective jurors could be fair. At the conclusion of the defense's questioning of prospective jurors, the court and counsel had an off-the-record, in-chambers discussion. Presumably during this in-chambers discussion, Mitchell's attorney moved to strike Juror M. for cause and the request was denied. Mitchell's attorney exercised a peremptory challenge to remove Juror M. from the panel. The jury was sworn.

The trial commenced and opening statements were given. At this point, the jury was dismissed for lunch and Mitchell's attorney stated for the record:

> With respect to the voir dire I had made a couple of challenges for cause in chambers ….
>
> [Juror M.] I also asked the Court to strike for cause because she indicated that she was more inclined to believe cops because her son was a cop in Cal[e]donia. She knew what he was going through and had gone through. The Court denied that challenge for cause. I was forced to use a peremptory strike to challenge that and I would want all of that on the record.

The trial court responded by explaining that Juror M. "indicated that [she] could be fair and would follow the instructions." The court indicated that "there was [not] a sufficient record to strike [the juror] for cause."

The jury convicted. Mitchell now appeals.

II. DISCUSSION

Mitchell claims his judgment should be reversed because he had to use one of his peremptory challenges to strike a juror, who should have been excused for cause. He claims that the trial court erroneously exercised its discretion in denying his request to excuse Juror M. for cause and, as a result, he was denied the "full complement of peremptory challenges" to which he was entitled. We reject his claim and affirm the judgment because his objection to Juror M. was not properly preserved and, based on the record before us, we cannot conclude that the trial court erroneously exercised its discretion.

Whether a prospective juror is biased and should be removed from the jury panel for cause is left to the trial court's discretion. *See* ***State v. Ferron***, 219 Wis.2d 481, 491-92, 579 N.W.2d 654, 661 (1998). We will overturn the trial court's decision only where the prospective juror's bias is "manifest." ***Id.*** at 496-97, 579 N.W.2d at 660. We review the record to determine whether a prospective juror's bias is "manifest." If the record either: "(1) does not support a finding that

the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge," ***id.*** at 498, 579 N.W.2d at 661, the "manifest" standard is met and the trial court's decision will be overturned. *See* ***id.***

This case, however, presents an additional problem because of the timing and nature of the objection to Juror M. As noted, Juror M. indicated a potential bias in favor of believing police officer witnesses. After expressing this belief, Juror M. did not indicate that she could not be fair and impartial when Mitchell's attorney asked general questions to the panel at large. Then, an in-chambers, off-the-record conference took place after which Juror M. was peremptorily struck by the defendant, the jury selected was sworn, and opening statements were given. Finally, Mitchell's attorney placed on the record a summation of his argument related during the in-chambers conference. The trial court responded that it did not excuse Juror M. for cause because the record was insufficient to do so and because Juror M. indicated that she could be fair.

Under these circumstances, we must reach two conclusions. First, Mitchell's objection to Juror M. was not properly preserved; and second, as a result, the record is insufficient for us to conclude that the trial court erroneously exercised its discretion in denying Mitchell's request to excuse Juror M. for cause.

We reach the first conclusion because of the timing and nature of Mitchell's objection. We recently concluded that objections relative to the jury panel should be made prior to the swearing of the jury. *See* ***State v. Jones***, 218 Wis.2d 599, 601, 581 N.W.2d 561, 562 (Ct. App. 1998) (specifically addressing ***Batson*** objection). The purpose of this rule is to allow the defendant, opposing

counsel and the trial court to engage in a discussion regarding the objection while the recollections of *voir dire* are fresh, because such a procedure would "achieve the fairest and most appropriate result." ***Id.*** at 602, 581 N.W.2d at 563.

Here, Mitchell did not object on the record until after opening statements. Therefore, there is no reflection in the record memorializing the entire substance of the in-chambers discussion. Mitchell's objection regarding Juror M. was made in a fashion that simply was insufficient to allow for proper review.

Further, because of the foregoing, we cannot conclude that the trial court erroneously exercised its discretion. The record is insufficient for us to overturn the trial court's determination. We do not know the substance of the in-chambers discussion. All we do know is that the recorded *voir dire*, together with the discussion in-chambers, caused the trial court to conclude that Juror M. would be "fair" and "follow instructions." Given the state of the record, we cannot overturn the judgment.[1]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] Mitchell cites ***State v. Zurfluh***, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986), in support of his argument that the judgment should be reversed. In ***Zurfluh***, we reversed a judgment on the basis that the trial court erroneously exercised its discretion in refusing to strike, for cause, a juror who said she was afraid she might have a problem making a fair and impartial determination of the evidence. *See* ***id.*** at 439, 397 N.W.2d at 155. ***Zurfluh*** does not control the instant case, however, because it did not involve an improperly preserved objection, nor did the case present similar circumstances regarding off-the-record discussions.