COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0102-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Donald Miller appeals a judgment of conviction and order denying post-conviction relief. Following a jury trial, Miller was convicted of the following charges: first-degree sexual assault with the use of a

dangerous weapon;[1] false imprisonment; two counts of first-degree recklessly endangering safety; two counts of battery; and possession of drug paraphernalia. Miller argues that he is entitled to a new trial, or at least an additional evidentiary hearing, because a juror was biased as a result of extraneous prejudicial information. He also argues that the trial court erroneously exercised its discretion when it limited cross-examination of the complaining witness with respect to her criminal record and her prior consensual sexual relationship with Miller. We reject his arguments and affirm the judgment and order.

The charges arose out of altercations with Miller's live-in girlfriend, C.V. At trial, she testified that on two different dates, he violently assaulted her, resulting in bruises and bite marks, restrained her against her will, threatened her with weapons, and forced her to have intercourse. Miller testified in his own defense. His theory of defense was that C.V's injuries were caused by her other boyfriend, and that she made up the allegations against Miller out of revenge for breaking up with her.

During voir dire, the panel was instructed to raise their hand to any question to which they had an affirmative response. The panel was then asked: "Are there any of you related by blood or marriage to or acquainted with the Defendant, Mr. Miller, who's seated at Defense table?" They were also asked: "Are there any among you who has a feeling of bias or prejudice for or against either party in this case" and "[a]re there any among you who cannot or will not try this case fairly and impartially on the evidence that is given here in court and

[1] The jury acquitted Miller of one of two first-degree sexual assault charges.

under the instructions of the Court render a just and true verdict?" No one raised their hand in response.

The trial court ruled that the prosecution could make no mention of pending battery charges and restraining order or harassment matters involving K.S., Miller's former girlfriend. The trial court also ruled that "absent some exception," the rape shield law limited inquiry into the victim's consensual sexual activity with Miller to the period between the dates of the two sexual assault charges. With respect to the victim's criminal convictions, the trial court ordered that C.V. may testify to the number of her convictions, but their nature could not be discussed unless the prosecutor chose to "open the door" and ask what they were. In that event, the court would permit "follow-up." During the trial, the district attorney inquired into the nature of C.V.'s convictions. On cross, the trial court sustained the district attorney's objection to one of defense counsel's follow-up questions.

At his postconviction hearing, K.S., Miller's former girlfriend, testified that she knew one of the jurors and in 1997, had told the juror that Miller had left her for another woman, was abusive to K.S. and threatened to kill her. At one point, the juror testified that she had had a conversation with K.S. but that it was so long ago she "wouldn't remember what it was." She expressly denied any knowledge that Miller had ever beaten K.S. She later testified that K.S. told her that her boyfriend was mean to her, but that it did not affect her ability as a juror. The juror did not recall whether she had any conversation with Miller. She testified that she made her decision in the case based solely on the facts as presented without any passion or prejudice in favor or against any party. The trial court denied Miller's request for a new trial.

Miller first argues that he is entitled to a new trial, or at least a remand for a further evidentiary hearing, based on his allegation that a juror was prejudiced by extraneous information. He argues that the court denied his request to thoroughly examine the juror at the postconviction hearing and, as a result, the trial court failed to consider all the relevant facts. We are unpersuaded.

With few exceptions, Wisconsin clings to the common law's prohibition against a juror giving evidence to impeach a verdict. ***State v. Messelt***, 185 Wis.2d 254, 265, 518 N.W.2d 232, 237 (1994). "Section 906.06(2) does not prevent jurors from testifying for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire." ***State v. Broomfield***, 223 Wis.2d 465, 474, 589 N.W.2d 225, 229 (1999). "Section 906.06(2) also provides two limited exceptions to the rule against juror testimony: jurors can testify whether 'extraneous prejudicial information was improperly brought to the jury's attention' or whether 'any outside influence was improperly brought to bear upon any juror.'" ***Id***. (citation omitted).

Here, Miller focuses on the issue whether extraneous prejudicial information was brought to the jury's attention.[2] "Information not on the record is not properly before the jury even if only one juror is exposed to it." ***Id***. at 479, 589 N.W.2d at 230-31. A party seeking to impeach a verdict based upon extraneous information brought before the jury must show that the information was extraneous as opposed to part of the deliberative process, that it was

[2] Contrary to the State's response, Miller does not claim that he is entitled to a new trial on the basis of an incomplete or incorrect response by a juror at voir dire. This may be because the juror could have interpreted the term "acquainted" to mean "introduced" or "known socially," *see* WEBSTER'S THIRD NEW INT'L DICTIONARY, 18 (1998), and there is no showing that the juror had ever been introduced or knew Miller socially.

improperly before the jury, and that it was potentially prejudicial. ***Id***. at 479, 589 N.W.2d at 231; ***State v. Poh***, 116 Wis.2d 510, 520, 343 N.W.2d 108, 114 (1984).

Here, the record is unclear whether the court found that the juror was competent to testify. Nonetheless, the court examined the juror with a number of questions counsel submitted. As a result, we assume that the court made an implicit determination that the testimony was competent under § 906.06(2), STATS. After determining that the testimony is competent, the court must conduct two additional analyses before deciding whether a new trial is warranted. First, the court must determine by clear, satisfactory and convincing evidence that the juror heard the statements in question, or engaged in the conduct alleged. ***Broomfield***, 223 Wis.2d at 479, 589 N.W.2d at 231. Next, the court must make the legal determination whether the extraneous information constitutes prejudicial error requiring reversal. ***Id***.

The juror testified that she did not recall the conversation with K.S.,[3] that she did not recall whether she ever spoke with Miller, and that she based her decision on the facts presented at trial. She testified that K.S. told her that her boyfriend was mean, but that information did not affect her ability as a juror in anyway whatsoever. The trial court was entitled to believe this testimony. The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Appellate court deference considers that the trial court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Estate of Dejmal***, 95 Wis.2d 141, 154, 289

[3] K.S. was not called as a witness at trial, and the court ruled that the prosecutor was barred from referring to her relationship with Miller.

N.W.2d 813, 819 (1980). Based upon the juror's testimony, the trial court was entitled to find that the only extraneous information to which the juror was exposed was that K.S.'s boyfriend was mean to her.

As a result, we must determine as a matter of law whether this information constitutes prejudicial error requiring reversal. ***Broomfield***, 223 Wis.2d at 480, 589 N.W.2d at 231. This analysis focuses on whether there is a reasonable possibility that the information would have a prejudicial effect upon a hypothetical average juror. ***Id***. We conclude that it would not. The juror had no recollection of the specifics of the conversation, and had no recollection of being told of any beating. The limited information that the juror recalled about K.S. is insufficient to infer prejudice.

Nonetheless, Miller further argues that the "juror had information to the effect that [Miller] had previously beaten [K.S] and threatened [her]." This argument stands in opposition to the juror's testimony. Because this argument ignores the trial court's implicit credibility finding, we must reject it.

Miller maintains that the court's questioning of the juror was incomplete to determine her knowledge of the prejudicial information. He argues that the juror told his investigator that K.S. had told her that Miller had hit her and threatened to kill her. We are unpersuaded. The juror specifically denied remembering any information regarding Miller beating K.S. and stated that she based her decision on the facts at trial. The trial court apparently resolved the inconsistencies in the evidence presented at the post-conviction hearing by assessing greater weight and credibility to the juror's testimony. *See* § 805.17(2), STATS. We conclude that under the circumstances presented, the trial court conducted an adequate inquiry.

Whether to grant a motion for a new trial on the basis of juror bias lies within trial court discretion. ***State v. Delgado***, 223 Wis.2d 270, 280, 588 N.W.2d 1, 6 (1999). "The record on appeal must reflect the circuit's court's reasoned application of the appropriate legal standard to the relevant facts of the case." ***Id***. at 280-81, 588 N.W.2d at 6. Its findings of fact on actual and inferred bias will not be reversed unless clearly erroneous. ***Id***. We may independently review the record to determine whether it provides a rational basis for the trial court's decision. ***Broomfield***, 223 Wis.2d at 477-78, 589 N.W.2d at 230. We conclude that the record supports the trial court's determination that the juror was not prejudiced by any extraneous information.

Next, Miller argues that the trial court denied him his right to cross examine C.V. regarding her prior convictions after she testified incompletely and denied one of the crimes. "A prior conviction of any crime is relevant to the credibility of a witness's testimony." ***State v. Smith***, 203 Wis.2d 288, 300-301, 553 N.W.2d 824, 829-830 (Ct. App. 1996); *see also* § 906.09, STATS. Here, the record fails to support Miller's claim that he was denied his right of cross-examination.

In chambers, the court ruled that C.V. had three prior convictions: (1) unlawful display of a driver's license, (2) open alcohol container in a motor vehicle, and (3) resisting and obstructing an officer.[4] Consistent with the court's ruling, C.V. testified on direct that she had been convicted three times. Later, when the prosecutor asked her, "your convictions that were mentioned were open

[4] At the conference in chambers, it was noted that while some of these offenses may not be crimes in Wisconsin, C.V. was convicted in Michigan, where they were punishable by jail time.

container, something to do with a driver's license and something to do with attempted resisting," C.V. answered, "Open container, I think that was underage drinking, I think."

On cross-examination, defense counsel asked C.V. the following questions, to which he received affirmative replies:

> Now one of your convictions … was unlawful display of driver's license. That's where you presented a false and forged driver's license to … Michigan State Police, correct?
>
> The alcohol, the open container in a motor vehicle, that's a conviction that you received 16 days in jail, correct?

The following exchange then ensued:

> Q. Your resisting and obstructing a police officer … for your switching drivers in a motor vehicle, correct?
>
> A. Well, that was thrown out of court.
>
> Q. That's what your conviction is for, correct?
>
> A. I wasn't convicted for it, though.
>
> Q. You tried to falsely and[sic] mislead a police officer, Sergeant Rod Pasuello.
>
> A. I didn't, though.
>
> [Prosecutor]: Your Honor, I'd object to this as beyond the scope of–
>
> THE COURT: Your objection is sustained.
>
> Q. You ultimately ended up with a conviction resisting and obstructing–
>
> A. No, I didn't.
>
> Q. (Continuing)–an officer from the Ironwood Public Safety Department.
>
> A. It was dropped.

Defense counsel then marked as an exhibit a certified copy of a conviction for resisting and obstructing in a Michigan court, and showed it to C.V. She acknowledged it, and explained that she thought it had been dropped.

Defense counsel pointed out that it had been reduced from a felony to "resisting and obstructing attempt," a misdemeanor.

C.V. replied: "I just thought it was a misdemeanor. I'm not sure. I don't know. That's all I knew. I thought it was dropped." The exhibit was then received without objection and defense counsel concluded his cross-examination, saying " I have no further questions."

On this record, Miller contends: "Defense counsel was not permitted to fully follow up [the prosecutor's] line of questioning" and that he "was cut off by the judge."[5] He claims that the trial court "ignored its own pretrial rulings" and refused to permit defense counsel to "fully explore these crimes of deceit." We disagree.

The record refutes Miller's argument. With one exception, defense counsel proceeded without objection. After the only objection was sustained, defense counsel proceeded with the same line of questioning, and offered an exhibit demonstrating the conviction. Defense counsel concluded by saying that he had "no further questions." This record fails to show that the trial court denied counsel the right to explore the criminal convictions. Additionally, at the trial level and on appeal, Miller fails to identify what further questions would have revealed. As a result, his argument fails. Sections 805.18 and 901.03(1)(b), STATS.

[5] These contentions, made in the fact section of the brief, are not facts, but at best are inferences and argument. Argument does not belong in the fact section of an appellate brief. *See* § 809.19(1), STATS. "A lawyer must distinguish a fact from an inference he seeks to press on the court. It is unprofessional conduct to represent inferences as facts. … Misleading representations, whether deliberate or careless, misdirect the attention of other lawyers and the district judge." ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987).

Finally, Miller argues that the trial court misapplied the rape shield law, § 972.11(1), STATS. He contends that the court erroneously limited evidence of consensual sexual activity between the parties to acts occurring between the dates of the crimes charged. Generally, evidence of past sexual conduct of a victim is inadmissible to defend a sexual assault prosecution. *See* § 972.11(2)(b), STATS.[6] Nonetheless, a prior consensual sexual relationship between the victim and the defendant may be relevant to the issue of consent. ***State v. Neumann***, 179 Wis.2d 687, 702 n.5, 508 N.W.2d 54, 60, n.5 (Ct. App. 1993).

The record discloses that the jury was permitted to consider evidence of the parties' consensual sexual relationship. Both C.V. and Miller testified to the effect that they dated for some months before C.V. moved into Miller's home. Miller testified further:

> Q. During the time you were dating, the time you lived together, were there any sexual relations between the two of you?
>
> A. Yes, there was.
>
> Q. Was there sexual intercourse between the two of you?

[6] Section 972.11(2)(b), STATS., provides:

> If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

A. Yes, there was.

Q. Describe that sexual intercourse, how it would normally take place.

A. Well, very first night I met her she wanted to have sex.

[Prosecutor]: Your Honor, the–guess the question is we need to deal with October 8th through the 18th. Anything else is–

THE COURT: Your objection is sustained.

Q. Let's talk about your sexual relationship, specifically the sexual intercourse, the sexual contact between October 8th and October 19th.

A. Well, I don't think we had sex for a couple days after when she came home and had the marks. … I think it was on the weekend, we started having sex again. I told her I didn't really want to touch her because she had been with somebody else, and this is like an ongoing thing with her.

Q. Now have you ever heard of rough sex?

A. Yes, I have.

Q. Have you ever partaken in rough sex?

A. Yes, I have.

Q. Between October 8th and October 19th?

A. Yes, I have.

Q. Have you and [C.V.] partaked in rough sex?

A. All the time.

Q. Is this something you initiate, or is this something she initiates or--

A. She pretty much demands sex a certain way. She has a particular way she likes to have sex.

Q. And what way is that?

A. Hard as you can give it to her, to put it bluntly.

We are satisfied that all relevant evidence concerning the parties' consensual sexual relationship was before the jury. The trial court's ruling limiting evidence of consensual sexual activities outside the time frame of the assaults did not prejudice Miller because evidence at some remote time is not relevant. In any event, to the extent the court erred when it limited the evidence of consensual

sexual activity, we conclude there is no reasonable possibility that the ruling had any impact on the outcome of the jury's decision, particularly in view of the fact that it acquitted Miller on one of the sexual assault charges. *See* ***Neumann***, 179 Wis.2d at 703, 508 N.W.2d 61.

By the Court.—Judgment and order affirmed.

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