COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1076-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

CANE, C.J. James Robinson appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of intimidation of a witness, contrary to § 940.42, STATS. Robinson additionally appeals from an order denying his motion for postconviction relief. Robinson argues that the trial court erred by refusing to strike a juror for cause and thereby denying Robinson's right to trial by an impartial jury of twelve. Because the challenged juror's

statements did not reflect bias or prejudice, but rather a conscientious concern about making the right decision, this court affirms the judgment and order.

After a jury trial, Robinson was convicted of intimidation of a witness. During voir dire, defense counsel requested that one of the prospective jurors be removed for cause because she expressed fear about making the right decision. When questioned by the court, the juror, Maria Hinton, gave no indication of bias or prejudice against any parties involved, nor did she indicate any feelings that would interfere with her ability to reach a just decision in the case. The following exchange then took place:

> [DEFENSE COUNSEL]: Is there anyone who just doesn't want to serve on this for any reason at all? Mrs. Hinton?
>
> JUROR MARIA HINTON: Well, I'm just afraid. That's all. I'm afraid I might not make the right decision.
>
> [DEFENSE COUNSEL]: You're afraid to accept the responsibility?
>
> JUROR MARIA HINTON: Yes.
>
> [DEFENSE COUNSEL]: You prefer to be excused?
>
> JUROR MARIA HINTON: If possible.

Defense counsel then requested that the court excuse Hinton because "she says she doesn't want to make a decision." The following exchange then occurred:

> THE COURT: Well, I assume judging another human being's guilt or innocence is a decision that nobody likes to make, but it's a duty that we all have.
>
> Ms. Hinton, do you think if you're selected to serve on this jury you can perform the duties as a juror? I understand you're reluctant, but do you think you can listen to the evidence and my instructions and decide the case?
>
> JUROR MARIA HINTON: Well, it will be a learning process for me, and I'm just afraid I might not make the right decision. That's all.

> THE COURT: Well, you'll have the consultation of eleven other people. You understand that? It won't be your decision alone.
>
> JUROR MARIA HINTON: All right.
>
> THE COURT: You have to make an independent decision, but you can confer with, obviously, with your other jurors?
>
> JUROR MARIA HINTON: I understand that.
>
> THE COURT: Do you think you can do that? I'm sorry?
>
> JUROR MARIA HINTON: I said I understand that.
>
> THE COURT: Do you think you can do that?
>
> JUROR MARIA HINTON: Well, I'll try.

Defense counsel then asked the following question: "If the other jurors think that my client is guilty, and you thought he wasn't guilty, do you think you would be able to sit there and say, 'I'm not going to change my vote just because the rest of you think I would'?" Defense counsel moved on to his next inquiry without eliciting a response from Hinton. After the attorneys were told to make their peremptory strikes, defense counsel attempted to return to the question; however, the court would not allow it citing it as unfair.

Later, outside the presence of the jury, the court explained its rationale in refusing to allow defense counsel to elicit a response to his question. The court's reasoning was two-fold: (1) the question would unfairly lock Hinton into a position and imply "to the panel that they can't change their mind while they're deliberating"; and (2) the question was based on a hypothetical, the asking of which is prohibited under § 805.08(1), STATS.[1]

[1] Although the trial court incorrectly cited § 805.01(5), STATS., counsel is, in fact, prohibited from supplementing the court's examination of a juror where such examination is repetitious or based upon hypothetical questions. *See* § 805.08(1), STATS.

Hinton was allowed to sit on the jury, and Robinson was ultimately convicted of the crime charged. After his conviction, Robinson filed a motion for postconviction relief alleging that his due process rights were violated when he was deprived of his statutory right to an impartial jury. The trial court denied Robinson's postconviction motion and this appeal followed.

Our supreme court clarified Wisconsin's jury bias jurisprudence in ***State v. Faucher***, 227 Wis.2d 700, 596 N.W.2d 770 (1999). "[A] criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution, as well as principles of due process." ***Faucher***, 227 Wis.2d 700, 596 N.W.2d at 777. The ***Faucher*** court recognized that "[t]o be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." ***Id***. Section 805.08, STATS., requires that a juror be indifferent and further requires that the trial court "examine on oath each person who is called as a juror to discover if he or she 'has expressed or formed any opinion or is aware of any bias or prejudice in the case.'" ***Id***. (quoting § 805.08(1), STATS.) The statute further directs that "[i]f a juror is not indifferent in the case, the juror shall be excused." Section 805.08(1), STATS. Given these principles, the ***Faucher*** court adopted the terms "statutory," "subjective" and "objective" as the appropriate terms to use when referring to juror bias. *See* ***Faucher***, 227 Wis.2d 700, 596 N.W.2d at 777.

Statutory bias is established where a "juror is related by blood or marriage to any party or to any attorney appearing in [the] case" or where the juror has a "financial interest in the case." Section 805.08(1), STATS. If a person meets any one of these descriptions, he or she "is statutorily biased and may not serve on

a jury regardless of his or her ability to be impartial." ***Faucher***, 227 Wis.2d 700, 596 N.W.2d at 778.

When determining whether a juror is objectively biased, the inquiry focuses on "whether the reasonable person in the individual prospective juror's position could be impartial." ***Id***., 227 Wis.2d 700, 596 N.W.2d at 779. In making its determination, a trial court "must consider the facts and circumstances surrounding the voir dire and the facts involved in the case." ***Id***. The ***Faucher*** court provided the following example of this objective standard:

> [W]hen a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, we explained that whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge.

Id.

A determination of objective bias is a mixed question of fact and law. *See* ***id***. The ***Faucher*** court described the standard of reviewing a trial court's objective bias determination as follows:

> [A] circuit court's findings regarding the facts and circumstances surrounding voir dire and the case will be upheld unless they are clearly erroneous. Whether those facts fulfill the legal standard of objective bias is a question of law. This court does not ordinarily defer to the circuit court's determination of a question of law. … However, a circuit court's conclusion on objective bias is intertwined with factual findings supporting that conclusion. Therefore, it is appropriate that this court give weight to the circuit court's conclusion on that question. …
>
> … We will reverse its conclusion only if as a matter of law a reasonable judge could not have reached such a conclusion.

Id., 227 Wis.2d 700, 596 N.W.2d at 779-80.

Turning to subjective bias, this term is used to describe "bias that is revealed through the words and the demeanor of the prospective juror." ***Id***., 227 Wis.2d 700, 596 N.W.2d at 778. Although "there may be the occasion when a prospective juror explicitly admits to a prejudice, or explicitly admits to an inability to set aside a prejudice, most frequently the prospective juror's subjective bias will only be revealed through his or her demeanor." ***Id***. As such, the determination of 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***. The ***Faucher*** court recognized that because the circuit court is better able to assess the demeanor and disposition of prospective jurors, "the circuit court's factual finding that a prospective juror is or is not subjectively biased" will be upheld unless it is clearly erroneous. ***Id***.

Here, Robinson relies on the line of cases culminating in ***State v. Ferron***, 219 Wis.2d 481, 579 N.W.2d 654 (1998), wherein our supreme court ruled that a juror who stated he could "probably" set aside his bias should have been struck for cause, as his equivocal response illustrated that he was not indifferent in the case. *See* ***id***. at 503, 579 N.W.2d at 663. In accord with its adoption of the three terms describing juror bias, the ***Faucher*** court noted that the juror in ***Ferron*** was subjectively biased. *See* ***Faucher***, 227 Wis.2d 700, 596 N.W.2d at 781-82. Specifically, the ***Faucher*** court emphasized that the ***Ferron*** juror's "state of mind as revealed through his answers to the questions posed by

the circuit court evinced his bias against the defendant."[2] ***Id***., 227 Wis.2d 700, 596 N.W.2d at 782. As such, Robinson urges this court to hold that Hinton's statements evince subjective bias.

Robinson concedes that the trial court was correct in distinguishing the instant facts from the ***Ferron*** line of cases, which all involved prospective jurors who had indicated some specific opinion, bias or prejudice. In contrast, Hinton expressed a more generalized reluctance to engage in jury service and an apprehension about making the right decision. Robinson asserts, however, that this is a distinction without a legal difference. In essence, Robinson argues that although these facts do not present the stereotypical case of juror bias or prejudice, Hinton's ability to find facts and apply the law was effectively impaired by her fear of making decisions. This court disagrees.

Robinson relies on ***State v. Hampton***, 201 Wis.2d 662, 549 N.W.2d 756 (Ct. App. 1996), to support his argument. In ***Hampton***, the court was confronted with the issue of whether the trial court had erred in refusing to voir dire a juror who was sleeping during the testimony of a witness. *See* ***id***. at 664, 549 N.W.2d at 757. In determining that the trial court should have inquired into the sleepy juror's inattentiveness, the ***Hampton*** court concluded that "implied in the concept of assuring an impartial jury is the presence of jurors who have heard all of the material testimony." ***Id***. at 668, 549 N.W.2d at 758. The ***Hampton*** court further determined that "[t]he absence of this condition, whether it is due to a

[2] In ***Ferron***, the challenged juror, during voir dire, indicated a bias towards defendants who did not take the stand. *See* ***State v. Ferron***, 219 Wis.2d 481, 487-88, 579 N.W.2d 654, 656-57 (1998).

hearing deficiency or a state of semi-consciousness, could imperil the guarantees of impartiality and due process." ***Id***.

Robinson's attempts to compare ***Hampton's*** sleeping juror to Hinton are unpersuasive. ***Hampton*** dealt with a juror's inattentiveness, which impaired the juror's ability to consider all evidence that had been placed before him. Here, Hinton's hesitance evinces a fear that she will not make the right decision. As the trial court so keenly recognized in its order denying Robinson's postconviction motion, Hinton's responses to the questions posed demonstrate "that she is trying to be fair minded, that she is a conscientious person, a very conscientious person." In Hinton's own words, she admits that serving on the jury "will be a learning process," and that she is just afraid of making the wrong decision, "that's all." Arguably, Hinton's fear of making the wrong decision would encourage her to be attentive rather than inattentive. As the United States Supreme Court recognized in ***Lockhart v. McCree***, 476 U.S. 162 (1986), "an impartial jury consists of nothing more than 'jurors who will *conscientiously* apply the law and find the facts.'" ***Lockhart***, 476 U.S. at 178 (quoting ***Wainwright v. Witt***, 469 U.S. 412, 423 (1985) (emphasis added)). This court holds that Hinton's comments are not indicative of bias, subjective or otherwise.

Robinson further argues that Hinton's apprehension about decision-making directly implicated her ability to act as a full member of a jury panel, thereby depriving Hinton of his right to a trial by an impartial jury of twelve. *See* ***State v. Hansford***, 219 Wis.2d 226, 241-42, 580 N.W.2d 171, 177-78 (1998). On the contrary, Hinton never indicated that she was afraid to make a decision during jury deliberations; rather, she indicated that she was afraid of making *the wrong decision*. Further, Hinton acknowledged that she understood that although she was to make an independent decision, she would be afforded the benefit of

consultation with eleven other people. Hinton's statements do not indicate an inability, on her part, to act as an independent and full member of the jury panel, but rather an understandable fear of making the wrong decision. Accordingly, this court holds that the trial court did not err by refusing to strike Hinton for cause.[3]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[3] Robinson additionally argues that the trial court misapplied the law when it based its decision not to strike Hinton for cause, in part, on her race. This court will affirm the trial court if it reached the correct result, even if this court disagrees with its reasoning. *See* ***Negus v. Madison Gas & Elec. Co.***, 112 Wis.2d 52, 61, 331 N.W.2d 658, 663-64 (Ct. App. 1983).