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November 17, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1314-CR

State of Wisconsin v. Frederick Booker (L.C. # 2009CF3989)

Before Higginbotham, Sherman and Blanchard, JJ.

Frederick Booker appeals an order that denied, without a hearing, his motion for a new trial based upon alleged juror bias. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm for the reasons discussed below.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

“[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 [by] principles of due process.” *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). These constitutional protections are further codified in WIS. STAT. § 805.08(1), which provides that a potential juror who “has expressed or formed any opinion, or is aware of any bias or prejudice in the case” or who “is not indifferent in the case,” shall be excused for cause.

Wisconsin recognizes three categories of juror bias: (1) statutory bias based upon certain prohibited relationships or financial interests; (2) subjective bias based upon the juror’s state of mind; and (3) objective bias based upon whether a reasonable person in the juror’s position could be impartial. *Faucher*, 227 Wis. 2d at 716-19. On this appeal, Booker contends that he was entitled to a new trial as a matter of law based upon statutory bias, or in the alternative, that he was entitled to a hearing on the question of subjective bias.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. *State v. Allen*, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the “who, what, where, when, why, and how” with sufficient particularity for the court to meaningfully assess the claim. *Allen*, 274 Wis. 2d 568, ¶23.

Booker’s motion alleged that, after trial, he learned through a third party that one of the jurors was the former stepmother-in-law of Booker’s brother, who testified at trial. Specifically,

Booker's brother Allen had been married to Rhoda Timmons, whose father was married to juror Willo Harris. Booker had not recognized Harris, and Harris had not recognized Booker, during voir dire. However, when Allen testified, Harris recognized him as her former stepson-in-law, and then realized that she also knew the defendant—contrary to answers she had given during voir dire. Harris informed the jury foreman of her realization, but not the judge or the parties.

Statutory Bias

A juror is barred by statute from serving on a case—regardless of any actual ability to be impartial—when “related by blood, marriage, or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case.” WIS. STAT. § 805.08(1); *Faucher*, 227 Wis. 2d at 717. Although the statute does not further define what constitutes a relationship “by blood, marriage, or adoption,” the Wisconsin Supreme Court has used its supervisory authority to formulate a per se rule that the statutory language encompasses relationships to the third-degree, and applies to witnesses as well as parties and attorneys. *State v. Gesch*, 167 Wis. 2d 660, 671, 482 N.W.2d 99 (1992) (barring brother of State's witness from serving as juror, using prior terminology of “implied bias” in place of current terminology of “statutory bias”).

Degrees of kinship by blood or adoption are set forth in WIS. STAT. § 990.001(16). However, this court appears to have issued conflicting opinions regarding how degrees of relationship by marriage should be calculated. In *State v. Noren*—which was issued before *Gesch*—we reasoned that “[m]arriage does not cause the blood relatives of one spouse to become related to the blood relatives of the other spouse” in holding that the marriage of a juror's second cousin to the victim's sister did not make the juror related to the victim by

marriage. *State v. Noren*, 125 Wis. 2d 204, 211, 371 N.W.2d 381 (Ct. App. 1985). However, in *State v. Czarnecki*—which was issued after *Gesch*, 167 Wis. 2d at 671, made reference to a potential juror being “related ... by blood or marriage to the third degree”—we held that the degree of relationship between persons related to one another through marriage should be calculated the same as if they were related by blood, so that a juror’s brother or a brother-in-law each would count as second-degree relationships. *State v. Czarnecki*, 231 Wis. 2d 1, 6-8, 604 N.W.2d 891 (Ct. App. 1999).

The State contends that *Czarnecki* misinterpreted *Gesch* and was wrongly decided. We need not address that argument, however, because we conclude that Allen’s divorce from Timmons severed any relationship by marriage Harris had to either Allen or Booker, whatever its degree. We acknowledge that the affect of divorce on relationships by marriage for purposes of juror disqualification is an issue of first impression in this State. However, WIS. STAT. § 767.001(1f) defines divorce as the “dissolution of the marriage relationship.” The only reasonable interpretation of the phrase “dissolution of the marriage relationship” is that the former spouses are no longer related by marriage for any purpose, including statutory juror disqualification. That is not to say that a juror’s former relationship by marriage to a party or witness might not raise a question of subjective or objective bias on a case-by-case basis, only that the disqualification is not automatic by operation of statute.

Since the juror in this case was not related by blood or adoption either to the defendant or to his witness brother, and since the juror’s former relationship by marriage to either the defendant or his brother had been dissolved prior to trial by her stepdaughter’s divorce from the defendant’s brother, the circuit court properly denied Booker’s request for a new trial on the basis of statutory bias.

Subjective Bias

Subjective bias may be revealed through an explicit admission of prejudice or, more commonly, through a juror's demeanor and credibility or lack of candor while answering questions on voir dire. *Faucher*, 227 Wis. 2d at 718. When seeking a new trial based upon a juror's failure to reveal information during voir dire, a defendant must demonstrate ““(1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.”” *State v. Messelt*, 185 Wis. 2d 254, 268, 518 N.W.2d 232 (1994) (quoted source omitted).

Assuming the facts alleged in Booker's motion to be true, we agree that Harris incorrectly indicated to the court during voir dire that she did not know the defendant, and that the question was material. Booker's motion does not, however, contain any allegations from which it could be determined that Harris was actually biased against Booker. First of all, the fact that Harris and Booker did not initially recognize each other during voir dire suggests that any past interactions they may have had were limited. Secondly, when Harris disclosed to the jury foreman her belated recognition of Booker's brother, and then Booker himself, the foreman asked her whether she thought she could remain impartial, and she answered yes.

Booker contends that he was denied his ability to provide the facts necessary to show actual bias because Harris refused to cooperate with his investigator. As the State points out, however, a postconviction hearing is not a discovery mechanism. Since the facts in Booker's possession, if true, would not establish any actual bias on the part of the juror, he is not entitled to a hearing on his claim of subjective bias.

IT IS ORDERED that the order denying Booker's postconviction motion for a new trial is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals