COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP362-CR **Cir. Ct. No. 2002CF4395**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Brown and Nettesheim, JJ., and LaRocque, Reserve Judge.

¶1 NETTESHEIM, J. Gerald Williams appeals from a judgment of conviction for first-degree reckless homicide in violation of WIS. STAT. § 940.02

(2003-04).[1] He claims that references to the decedent as "the victim" compromised his theory of self-defense; that certain admitted testimony was hearsay and was not cured by a limiting instruction; and that his right to a fair trial was violated when the trial court dismissed a juror without making sufficient effort to retain her. We disagree and affirm the judgment.

Background

¶2 The core facts are undisputed. On July 20, 2002, a confrontation between Williams and Donald Smith ended in an exchange of gunfire. Smith was shot and killed. Williams was charged with first-degree reckless homicide. In dispute are facts relating to whether Williams or Smith was the aggressor and exactly what sparked the deadly confrontation. Williams contended he acted in self-defense and pled not guilty. The jury, unpersuaded, convicted him as charged. More facts will be supplied as needed.

Characterizing Decedent as "The Victim"

¶3 At trial, Detective Ricky Burems testified that he was called to the scene to investigate a report of a homicide. He testified that, upon arrival, he observed a bullet-hole-ridden car and "the victim Donald Smith" in the driver's seat, apparently dead of a gunshot wound to his left chest. Burems further described finding a loaded semi-automatic handgun on the seat next to Smith, and more ammunition on the floor. Burems testified that photographs of the scene

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

depicted "the victim's vehicle, and you can see the victim seated in the driver's seat."

¶4 Since Williams was defending the charge on the grounds of self-defense, he objected to Burems referring to Smith as "the victim," asserting that whether Smith was a victim was for the jury to decide. The trial court overruled the objection without comment. Burems used the term "victim" a few more times when speaking of Smith, as did two other detectives during their testimony describing their investigative duties. Williams submits on appeal that by allowing Smith to be called "the victim," the trial court permitted the implication that Williams was the aggressor, thereby undermining his claim of self-defense.

¶5 We review the trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will not find an erroneous exercise of discretion if there is a rational basis for the trial court's decision. ***Id.*** Optimally, there should be evidence in the record that discretion was, in fact, exercised such that the basis of that exercise of discretion is set forth. ***Id.*** If the trial court fails to lay out its reasoning, however, we must independently determine whether the record provides a basis for the trial court's decision. ***Id.*** at 343.

¶6 Here, the trial court overruled Williams' objection without further comment. Our review of the record nonetheless leads us to conclude that this determination did not constitute an erroneous exercise of discretion. The jury was aware that Williams was charged with killing Smith. Also, at the time of the incident, all three testifying detectives were members of the Milwaukee Police Department homicide unit. Burems and his partner, called to investigate a report of a shooting, arrived to find a man shot dead. The third detective was assigned to

examine the deceased's car for evidentiary purposes. The detectives used the word "victim" in the context of describing events in the course of their investigative activities. Granted, the trial court might have instructed them to use the appellation "Mr. Smith"; perhaps ideally it should have. Under these facts, however, it strikes us as logical for the police officers to refer to the decedent in a homicide investigation as "the victim."

¶7 We recognize that in many situations a mere "sustained" or "overruled" will suffice to address an evidentiary objection because the grounds for the trial court's ruling will be self-evident from the context. In other situations, it will be preferable for a trial court to articulate its rationale when ruling on an objection. *See* ***id.*** at 342 (stating that the basis for the exercise of discretion should be set forth). Under the particular facts of this case, a plausible argument can be made that Williams' objection called for more from the trial court. However, we also bear in mind that "discretion" contemplates a measure of latitude such that one trial court might reach a decision that another judge or court might not. ***Hartung v. Hartung,*** 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The exercise of discretion carries with it "a limited right to be wrong" without the danger of incurring reversal. ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). A proper exercise of discretion is not tested by another court's subjective sense of what might be a "right" or "wrong" decision in the case. ***Id.*** Rather, the determination will stand unless it can be said—and it cannot here—that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. *See* ***id.*** As we observed in another context, a defendant is entitled to fairness, not perfection. ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278. We conclude that the term "victim" did not cast Smith in an overly sympathetic light. We see no reversible error.

Hearsay and Limiting Instruction

¶8 Leo Covington was a passenger in Smith's car the night of the confrontation. At trial, Covington testified that he and Smith were on their way to purchase cigars and something to drink when, while at a red light, Smith's attention was caught by a nearby car or the person in it. Covington testified that Smith said, referring to Williams, "[T]his nigger supposed to be lookin' for me," so Smith pulled into the gas station. Williams objected on the grounds of hearsay noting that, with Smith dead, Smith could not be cross-examined about it. In response, the State contended that it offered the statement simply to explain what happened next, namely, Smith's act of driving into the gas station. The trial court accepted this explanation and then advised the jury that the testimony was offered solely to explain the chain of events and cautioned that the statement should not be accepted for its truth because Smith could not testify as to whether or not it was true.

¶9 Covington went on to testify as follows. Smith pulled up to a gas pump and approached Williams.[2] Smith twice asked him, "[Y]ou supposed to be lookin' for me?" When Williams did not respond, Smith hit him in the face with his fist. Williams got in his car and drove off. Smith then pulled out a pistol and pointed it at the fleeing car, but did not shoot. Covington and Smith began driving out of the station lot, headed in a different direction than that taken by Williams. Covington testified that shots were then fired at them, and Smith evidently was hit.

[2] Covington testified that Smith approached "a guy"; it is not disputed that "the guy" was Williams.

Covington jumped out of the car window and ran, afraid of encountering the police because he was on parole in Illinois.

¶10 Williams contends that Covington's statement about Williams looking for Smith should have been stricken as hearsay and that the trial court's limiting instruction could not overcome the prejudice the statement caused. We disagree.

¶11 A trial court's decision to admit a hearsay statement is a discretionary one, and we will not reverse the decision unless the record shows that the ruling was manifestly wrong and an erroneous exercise of discretion. ***State v. Hale***, 2003 WI App 238, ¶12, 268 Wis. 2d 171, 672 N.W.2d 130, *aff'd on other grounds*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637. Here, the trial court admitted the statement to explain why Smith entered the gas station lot, not to show that Williams actually was looking for Smith. Where a declarant's statement is offered for the fact that it was said, rather than the truth of its content, the evidence by definition is not hearsay. *See* ***State v. Eugenio***, 219 Wis. 2d 391, 411, 579 N.W.2d 642 (1998); WIS. STAT. § 908.01(3).

¶12 Williams also complains that the admission of Smith's statement unfairly prejudiced him because it implied that there was on-going animosity between the two men, such that the jury would disbelieve his claim of self-defense. That may be one take on the statement that Williams was looking for Smith. An equally plausible one is that, rather than avoiding the situation, Smith instead chose to be the aggressor. This latter interpretation is supported by the testimony that Smith approached Williams and struck him in the face.

¶13 And, in any event, after determining that the evidence was not excludable hearsay, the trial court immediately cautioned the jury that the

testimony should not be accepted "for its truth because the person who said those words is not here today to tell us whether those words are true or not." A limiting instruction serves to eliminate or minimize the risk of undue prejudice. ***State v. Parr***, 182 Wis. 2d 349, 361, 513 N.W.2d 647 (Ct. App. 1994). Moreover, when a trial court gives a cautionary instruction for this purpose, we presume that the jury follows it and acts in accordance with the law. ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475. The admission of Smith's statement for the narrow purpose of explaining how events unfolded, coupled with a limiting instruction, was not manifestly wrong or an erroneous exercise of discretion. Williams' argument fails.

Dismissal of Juror

¶14 Williams asserts that he was denied his Sixth Amendment right to a fair and impartial jury because the trial court dismissed a juror based upon an unreasonable conclusion of bias. We disagree.

¶15 Before we get to the particular facts concerning this issue, we set out the relevant law. Except in limited circumstances not relevant here, the jury in a felony prosecution in Wisconsin must be composed of twelve persons. *See* ***State v. Lehman***, 108 Wis. 2d 291, 307, 321 N.W.2d 212 (1982); *see also* WIS. STAT. § 756.06(2)(a). If more than the necessary number of jurors remain when the cause is submitted, the court is to determine by lot which jurors will not participate in deliberations, and discharge them. WIS. STAT. RULE § 805.08(2).

¶16 It is within the trial court's discretion to discharge a regular juror during trial for cause. ***State v. Williams,*** 220 Wis. 2d 458, 466, 583 N.W.2d 845 (Ct. App. 1998). Out of the presence of the other jurors, the trial court must make careful substantive inquiry into the matter of a juror's release and exert reasonable

efforts to avoid needlessly discharging him or her. ***Lehman***, 108 Wis. 2d at 300. Where possible juror bias is in question, specific proof of bias is not required. ***Williams,*** 220 Wis. 2d at 466. A proper exercise of discretion contemplates a weighing of the appropriate considerations and a determination that the integrity of the trial and the jury deliberation will be advanced if the case is given to the twelve remaining jurors. *See* ***id.***

¶17 Now to the particular facts surrounding this issue. After the close of the evidence, but before final arguments and jury instructions, the bailiff reported to the trial court that one of the thirteen jurors had advised that she had a concern about her possible bias in the case. Specifically, the juror referenced a portion of Williams' testimony in which he admitted that, when first questioned about shooting Smith, he had lied to the police about his involvement because he was scared.

¶18 Out of the presence of the other jurors, the trial court questioned the juror regarding this matter. In response, the juror reported an encounter with police officers at her home about a year before during which she and her family felt intimidated. She stated that after this experience she could understand why fear might impel Williams to initially lie to the police. Asked whether she thought she could be a fair juror, the woman answered, "For that part of it, I don't know, I honestly couldn't say." She stated that she believed she could follow the court's instructions as to the law, but did not want "to have an argument with fellow jurors one way or the other."

¶19 The trial court expressed concern about the juror's ability to deliberate impartially:

> My belief is that [the juror] based on what she said cannot give both parties a fair trial….
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> ….
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> I didn't hear her say she can't be fair. She concluded her comments with a shrug of the shoulder and the words "I just don't know," and I took that to mean given the whole context of her comments combined with the tremble in her voice and given the way that she alerted my deputy saying that it was something very important that I need to know, seemed to have great difficulty putting this to one side in her mind and judging the evidence just as it is…. I think she's already let her experience bleed into her understanding and the inference she's drawn from the facts here. So, I don't believe she can give the parties a fair trial at this point.

¶20 Over Williams' objection, the trial court designated the juror the alternate juror and then dismissed her. The remaining twelve jurors were told only that the dismissed juror had expressed some concerns about her objectivity, and thus was named as alternate and released.

¶21 A juror who has expressed or formed any opinion, or is aware of any bias or prejudice in the case should be removed from the panel. ***State v. Nielsen,*** 2001 WI App 192, ¶24, 247 Wis. 2d 466, 634 N.W.2d 325. Nevertheless, Williams contends the trial court discharged the juror without exerting reasonable efforts to avoid doing so as required by ***Lehman***, 108 Wis. 2d at 300. He argues that the trial court's conclusion that the juror could not be fair is unsupported by any evidence resulting in a violation of his Sixth Amendment right to a fair and impartial jury.

¶22 The focus of Williams' complaint that he was deprived of a fair and impartial jury is not entirely clear. He makes no argument that the selection of the alternate juror should have been by lot. *See* WIS. STAT. RULE § 805.08(2). Instead, he claims the discharged juror was not demonstrably biased, yet offers no

evidence or argument that the jury that convicted him actually was. A defendant has no right, however, to insist on the retention of a particular juror merely because that juror might be biased in his favor. ***Williams,*** 220 Wis. 2d at 466. A claim that a jury is partial must focus not on the jurors who were removed but on the jury that actually sat in the case. ***State v. Traylor,*** 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992); *see also* ***Ross v. Oklahoma***, 487 U.S. 81, 85-86 (1988). Williams offers no such proof as to the jurors who weighed his fate. Where there is no showing that the actual jury was biased, a court is asked to speculate that another juror or panel would have been fairer. ***Traylor,*** 170 Wis. 2d at 400. A new trial is not warranted based on speculation that the result would have been different had the jury been made up of different impartial jurors. ***Nielsen,*** 247 Wis. 2d 466, ¶26 n.5.

¶23 The exercise of the trial court's discretion regarding this matter is well documented. The juror was examined on the record in the presence of both parties, and out of the presence of the other jurors. After the juror made her statement, the court asked her whether she believed she could be a fair juror; she responded that she "honestly couldn't say." The court then offered each side the opportunity to question her. The court also granted Williams' request to be heard out of the presence of that juror and directed that the juror be escorted to the deputy's office to avoid having her go in and out of the jury room.

¶24 Based on the information gleaned in the exchange, the trial court concluded, based on the juror's words and her demeanor, that the juror could not

"be a fair juror at this point."[3] In addition, the court noted that as soon as the matter came to light, it had instructed the bailiff to caution the juror to not discuss the matter with the other jurors, and the bailiff confirmed that the juror assured that she had not done so. The court stated that it would then advise the remaining twelve jurors that, for reasons not essential for them to know, the juror would be designated as the alternate. We see no erroneous exercise of discretion.

Conclusion

¶25 While under the particular facts of this case it arguably would have been preferable that the police witnesses not have referred to Smith as "the victim," we cannot say that the trial court's ruling represented an erroneous exercise of discretion. We also conclude that the trial court's cautionary instruction properly advised the jury of the limits of the hearsay statements attributed to Smith. Finally, we conclude that the trial court properly addressed the matter of possible juror bias brought to the fore by the juror herself. Twelve properly instructed jurors whose partiality he does not challenge convicted Williams.

By the Court.—Judgment affirmed.

[3] We reject Williams' urging to ignore the trial court's reference to the juror's demeanor. Instead, we defer to the trial court's superior ability to assess the juror's demeanor, an important aspect of determining his or her impartiality. ***State v. Brunette***, 220 Wis. 2d 431, 441, 583 N.W.2d 174 (Ct. App. 1998).

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