COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
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. 2007AP400-CR **Cir. Ct. No. 2006CF37**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK H. TODY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Mark Tody, Jr., appeals a judgment of conviction for taking and driving a vehicle without consent, as party to the crime, contrary to

WIS. STAT. §§ 943.23(2) and 939.05.[1] He also appeals an order denying his motion for postconviction relief. Tody asserts multiple claims based upon the court's decision to allow the judge's mother to serve on the jury. Tody also alleges ineffective assistance of counsel. We reject Tody's arguments and affirm.

BACKGROUND

¶2 Tody's jury trial occurred on June 7, 2006, before Judge Robert Eaton. During the voir dire, the following exchange occurred between the court and a prospective juror:

> [Court]: Any of you have relatives employed in a law enforcement related capacity?
>
> Ms. Eaton do you have a relative employed in the law enforcement related capacity?
>
> [Juror] Eaton: The judge.
>
> [Court]: I like – I like to consider myself part of law enforcement or I may be disowned. You are related to me how?
>
> [Juror] Eaton: Your mother.

When the attorneys were permitted to address the prospective jurors, the district attorney had the following exchange with Eaton[2]:

> [District Attorney]: Mrs. Eaton, I know you're the judge's mother, do you feel comfortable sitting on a trial where he's the judge but he's not party in the case?
>
> [Juror] Eaton: I don't think it makes any difference.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] In this opinion, we refer to Judge Eaton as "the judge," while referring to juror Eaton as "Eaton."

> [District Attorney]: Doesn't make any difference one way or the other to you? You have no opinion about the defendant's guilt or innocence?
>
> [Juror] Eaton: I know nothing about it.

Tody's attorney also addressed Eaton:

> [Tody's Attorney]: Do you feel you could be a fair and impartial juror? Would you have to explain to His Honor Judge Eaton, let's say you voted for a verdict of not guilty, would you feel you would have to explain or justify why you voted that way?
>
> [Juror] Eaton: No.

¶3 At the end of the voir dire, Tody's attorney moved to strike Eaton for cause, contending she might unduly influence other jurors because of her relationship to the judge. The court denied the motion, concluding there was no authority for disqualifying a juror because of her relationship to a neutral party and that Eaton's answers during the voir dire indicated she would be impartial. The trial proceeded with Eaton on the jury.

¶4 The underlying facts in this case involved stealing a Jeep from the Ashland airport. The case centered on the respective roles of Tody and his two friends, Landon LaPointe and Jonathon Newago. Tody's defense was that he was merely a bystander to the crime. LaPointe testified that a couple of months before taking the Jeep, Tody raised the prospect of stealing a vehicle from the airport. Tody, LaPointe, and Newago made three separate trips to the airport. On the first trip, they looked for vehicles and found the Jeep. They decided to take the Jeep, and, on the second trip, they attempted to do so, but the battery was dead.

¶5 On their third trip, they brought a replacement battery, and Laptonte started the Jeep. Tody testified that he only opened the trunk of LaPointe's car so Newago could get the battery out. LaPointe testified that Tody actually carried the

battery from LaPointe's car to the Jeep. LaPointe and Newago drove the Jeep from the airport, while Tody drove Laptonte's car. LaPointe and Tody later discussed changing the vehicle identification number and attempting to sell the Jeep.

¶6 The jury found Tody guilty, and the court entered judgment accordingly. Afterward, Tody brought a motion for postconviction relief, asserting ineffective assistance of counsel. The court denied Tody's motion.

DISCUSSION

¶7 Tody claims he was denied his right to a fair and impartial jury because of comments during the voir dire and the court's decision not to strike Eaton. Tody also contends the judge should have recused himself from deciding whether to strike Eaton. Further, Tody claims his counsel was ineffective for failing to adequately prepare Tody for his testimony and for failing to attempt to rehabilitate adequately rehabilitate him after his testimony. Finally, Tody requests that we exercise our discretionary power of reversal.

Juror Bias

¶8 A defendant's right to 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. ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). In Wisconsin, there are three categories of bias: statutory bias, subjective bias, and objective bias. ***Id.*** at 716.

¶9 Statutory bias applies to any juror who is "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. Statutory bias is a per se category that disregards an individual's ability to act impartially. ***Faucher***, 227 Wis. 2d at 717.

¶10 Subjective bias is based on a juror's state of mind, as revealed through the juror's words and demeanor during the voir dire. ***Id.*** at 717-18. A circuit court's finding regarding subjective bias will be upheld unless clearly erroneous. ***Id.***

¶11 Objective bias does not turn upon a juror's state of mind, but instead on whether a reasonable person in the juror's position could be impartial. ***Id.*** at 718. When determining "whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case." ***Id.***

¶12 For the most part, Tody attempts to avoid the framework for analyzing juror bias set out in ***Faucher***. He argues that a per se rule should be adopted precluding members of a judge's immediate family from serving on a jury.[3] Tody does, however, alternatively argue Eaton was objectively biased.

¶13 In support of his argument for a per se rule, Tody contends that a judge's immediate family members will more likely want to please the judge and may unduly influence other jurors. He relies on our supreme court's decision in

[3] Additionally, Tody asserts a broader jury bias argument, claiming he was denied his right to an impartial jury independent of the judge. The argument ignores the ***Faucher*** framework for analyzing juror bias, and Tody provides no authority for analyzing juror bias outside that framework. *See* ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999). He also cites to judicial bias cases. *See, e.g.*, ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31. It is unclear whether Tody is arguing jury bias, judicial bias, or some hybrid of the two. Tody's argument is undeveloped, and we decline to develop it for him. *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed).

State v. Gesch, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), where the court determined that a juror related to a State's witness by blood or marriage to the third degree must be excused because of "implied bias." ***Id.*** at 669.

¶14 However, a juror's relationship to the judge is not, by itself, a jury bias issue. Unlike a State's witness, a judge is not associated with either party. No bias is implicit from a relationship to a neutral party.[4] We also note that ***Gesch*** was decided before ***Faucher***, which redefined the categories of jury bias. In ***Faucher***, our supreme court noted that the issue in ***Gesch*** would now be analyzed as objective bias. ***Faucher***, 227 Wis. 2d at 723-24.

¶15 When considering objective bias, the question is whether a reasonable juror in Eaton's position could act impartially. *See* ***id.*** at 718. Eaton's position here, according to Tody, was having a favorable view of law enforcement, which Tody characterizes as a pro-law-enforcement, pro-prosecution bias. We conclude that Tody's objective bias argument fails because the premise of his argument, Eaton's favorable view of law enforcement, is not established in the record.

¶16 In ***Faucher***, the court referenced previous cases that would be analyzed under objective bias. *See* ***id.*** at 721. In those cases, the juror's "membership" in a class of jurors that were arguably biased was established by the voir dire. *See* ***id.*** at 721-23. For example, in ***Gesch***, the juror indicated he was related to a State's witness. ***Gesch***, 167 Wis. 2d at 663. In ***State v. Louis***, 156 Wis. 2d 470, 474, 457 N.W.2d 484 (1990), two jurors revealed that they were

[4] In his reply brief, Tody acknowledges that "not all immediate family members of judges will be unfair, non-independent jurors."

employed in the same police department as a State's witness. *See* ***Faucher***, 227 Wis. 2d at 722. By contrast, Tody attempts to base his objective bias argument on a number of unwarranted inferences from the voir dire. Eaton did not say she had a "favorable view of law enforcement," or that she was "pro-law-enforcement" or "pro-prosecution." From the available facts, we cannot conclude that a reasonable juror in Eaton's position could not act impartially. *See* ***id.*** at 717-18.

Judicial Bias & Recusal

¶17 Tody also claims the judge erroneously failed to recuse himself from deciding the motion to strike Eaton from the jury. He argues that recusal was constitutionally required because the court's denial of the motion created the appearance of bias and was statutorily required because the judge made a subjective determination that he could not act impartially.

¶18 "A fair trial [before] a fair tribunal is a basic requirement of due process." ***State v. Carprue***, 2004 WI 111, ¶59, 274 Wis. 2d 656, 683 N.W.2d 31 (citation omitted). Disqualification based upon allegations of bias or prejudice is only constitutionally required in the most extreme cases, such as where the judge has a direct and substantial pecuniary interest in the case. ***Id.***, ¶¶59-60. Otherwise, most matters of judicial disqualification do not rise to a constitutional level. ***Id.***, ¶60. "Matters of kinship, personal bias, state policy, and remoteness of interest are generally matters of legislative discretion." ***Id.*** (citation omitted).

¶19 The Wisconsin legislature has addressed judicial disqualification in WIS. STAT. § 757.19. As relevant here, § 757.19(2)(g) requires disqualification when "a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This provision only requires disqualification when the judge actually makes a subjective determination that he

or she, in fact or appearance, cannot act impartially. ***State v. American TV & Appliance***, 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989). It does not require disqualification when a judge's partiality can be reasonably questioned by someone other than the judge. ***Id.*** Further, when a party alleges bias favoring the prosecution, such as here, and that party does not raise the issue before the circuit court, we assume the court believed it could act impartially when deciding to preside over the case. ***Carprue***, 274 Wis. 2d 656, ¶62.[5]

¶20 First, this was not an extreme case where disqualification was constitutionally required. *See* ***id.***, ¶¶59-60; *see also* ***State v. Gudgeon***, 2006 WI App 143, ¶¶23-24, 295 Wis. 2d 189, 720 N.W.2d 114. The basis of Tody's constitutional argument is that the court created an appearance of bias for the State by denying the motion to strike Eaton. According to Tody, this appearance of judicial bias resulted from the fact that the State opposed the motion. However, Tody offers no authority for discerning judicial bias solely from the parties' respective positions on a motion or the court's ultimate ruling on it. Instead, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 US 540, 555 (1994).

¶21 We next address whether the judge was required to disqualify himself under WIS. STAT. § 757.19(2)(g). Even though there was no recusal motion, Tody contends the judge actually made a subjective determination that he could not act impartially when stating the following:

> I'm trying to go through potential problems in my mind. Are there potential problems with juror misconduct? Might

[5] Tody never moved for the judge's recusal. Tody's judicial bias arguments are limited to the judge's failure to unilaterally recuse himself from deciding the motion to strike Eaton.

> I be called into a position where I would have to rule on some type of juror misconduct involving my mother? Even if that came up I think the thing to do at that point is get a substitute judge. I don't think I have any legal basis for excusing her.

¶22 We reject Tody's assertion that this statement constituted a determination that the judge could not act impartially when deciding the motion before him. The judge was contemplating hypothetical situations, none of which actually occurred. Because no motion for recusal was made, the judge's decision to preside over the issue indicated he believed that he could do so impartially. *See* ***Carprue***, 274 Wis. 2d 656, ¶62.

Ineffective Assistance of Counsel

¶23 Tody's ineffective assistance claims are based on his response to the following question on cross-examination, "[I]s it fair to say that you were helping in stealing this vehicle?" Tody replied, "In a way, ya, I guess." Tody contends his attorney failed to adequately prepare him to testify at trial and deficiently failed to rehabilitate Tody on redirect examination. According to Tody, had he properly been prepared to testify, he would have answered the State's question by stating that he did not have the purpose to help steal the Jeep.

¶24 A defendant claiming ineffective assistance of counsel must establish that a defense attorney's performance was deficient, and that the deficient performance prejudiced the defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Deficient performance has prejudiced the defense when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). An

ineffective assistance claim fails if we conclude either that counsel's performance was not deficient or that the defendant was not prejudiced by the alleged deficiency, and we may begin with either inquiry. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶25 Here, we begin and end our ineffective assistance analysis with the prejudice inquiry. In the context of the evidence presented, we cannot accept Tody's assertion that the jury's determination of intent hinged upon his answer to the State's question. Tody's intent was established by his actions. Tody's own testimony established that he was involved in the crime from the planning stage through its commission. He did not arrive at the crime scene by accident, and he was not merely a bystander while he was there. Further, LaPointe's testimony indicated that Tody's overall role was greater than Tody admitted, even while LaPointe was obviously attempting to protect Tody by minimizing Tody's role.[6] We reject Tody's characterization of the case against him, and even absent the alleged deficiencies of counsel, we are confident the result would have been the same.

Discretionary Reversal

¶26 Tody's final argument is that we should exercise our discretionary power of reversal. We may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35. Tody

[6] LaPointe acknowledged that his testimony was inconsistent with a prior written statement given to police. Further, his memory conveniently lapsed multiple times and had to be refreshed by his written statement and preliminary hearing testimony.

does not address the standards for determining whether a controversy has been fully tried or whether justice has been miscarried. Instead, Tody's arguments for discretionary reversal merely restate his other arguments. We have already rejected those arguments.

By the Court.—Judgment and order affirmed.

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