COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1757 **Cir. Ct. No. 2005CI3**

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

IN RE THE COMMITMENT OF JAMES P. POBLITZ:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES P. POBLITZ,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Portage County: THOMAS J. FLUGAUR, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 DYKMAN, J. James Poblitz appeals from an order finding that he is a sexually violent person under WIS. STAT. § 980.01(7)(2005-06),[1] and from an order denying his postconviction motion seeking a new trial. Poblitz argues that the trial court erroneously exercised its discretion by questioning and dismissing an impaneled juror outside the presence of either Poblitz or his attorney. Poblitz argues that the court erroneously exercised its discretion by applying the wrong legal standard and failing to use a reasoning process in questioning and dismissing the juror. We conclude that any error by the trial court in questioning and discharging the juror was harmless. We affirm.

Background

¶2 The following facts are undisputed. On September 26, 2005, the State filed a petition for an order to detain Poblitz as a sexually violent person pursuant to WIS. STAT. § 980.01(7). The matter was tried to a jury. During the jury selection, the court advised the prospective jurors that the purpose of the case was to determine whether Poblitz "suffers from a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence." Thirteen jurors were impaneled to hear the case, with the expectation that if no juror were excused during the trial, one would be randomly selected and dismissed before deliberations began. After the close of evidence, but prior to instructions and closing arguments, juror Molly Baehr wrote a note to the court. The note read as follows:

> Over the course of this trial, I have come to realize that I will not be able to make a decision. At 8:00 a.m. yesterday

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

> morning, I had no moral objection to determining the fate of a fellow human being but as of now, I do.
>
> I cannot morally say that the defendant should be allowed to walk free any more than I can say that he should spend the rest of his life institutionalized.
>
> I have been considering the possibilities since we adjourned last night, and have arrived at my conclusion by my own free will.
>
> The only way I can morally go [on] at this point is to ask to be the alternate juror.

¶3 The trial court shared the note with counsel and Poblitz. Noting that there were still twelve jurors, the court expressed that it was "inclined to strike her for cause at this point." The court invited counsel to "contemplate [the situation] … over the lunch hour." Following lunch, the court informed counsel that it would conduct a *voir dire* of Baehr, and that the court did not believe it would be appropriate for counsel to ask questions or interact with Baehr during this *voir dire*. The court informed counsel that a transcript of the *voir dire* would be made available to them. Counsel agreed that it was not necessary for them to be present during the questioning since there would be a complete record available.

¶4 After questioning Baehr outside of the presence of Poblitz and his counsel, the court decided to excuse her from the jury. The court summarized her testimony:

> She … went into areas of being confused and not knowing how she could possibly decide this case, and I had some concerns about that and tried to follow-up with questions concerning that regarding arguments of counsel and court's instructions and things like that, but ultimately she would always come back to her feeling that she couldn't morally say that Mr. Poblitz was … a sexually violent person versus not sexually violent.

Neither attorney objected to the court's dismissing the juror. The trial proceeded with instructions and closing arguments. The twelve remaining jurors found Poblitz to be a sexually violent person.

¶5 Poblitz moved the trial court for a new trial, arguing that the court had erroneously exercised its discretion by dismissing the juror, and that it had violated his rights to be present and to be assisted by counsel when the trial court questioned Baehr outside the presence of either Poblitz or his attorney. Poblitz also argued that if his attorney's failure to object to the court's questioning or dismissing Baehr waived those objections, he was deprived of his right to the effective assistance of counsel. After a hearing, the trial court rejected all of Poblitz's arguments and denied the motion for a new trial. The court concluded that Poblitz had not been denied his right to a trial by an impartial jury or effective assistance of counsel. Poblitz appeals.

Discussion

¶6 Poblitz argues that the trial court erroneously exercised its discretion in questioning and dismissing Baehr, thus requiring reversal. Poblitz contends that the court applied the wrong legal standard for responding to a juror's request to be dismissed because it did not apply the procedure set forth in ***State v. Lehman***, 108 Wis. 2d 291, 300, 321 N.W.2d 212 (1982) (stating that the juror should be questioned in the presence of counsel and the defendant, and that the court should avoid discharging the juror). Poblitz also contends that the court violated his right to be present and assisted by counsel at trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution by questioning Baehr outside the presence of Poblitz and his counsel. Finally, Poblitz argues that the trial court failed to provide a

reasonable explanation for why Baehr was unqualified to continue to serve as a juror.[2]

¶7 The State responds that the trial court did not erroneously exercise its discretion in questioning and dismissing Baehr because the procedures set forth in ***Lehman*** are not mandatory. Further, the State contends, the court acted within its discretion in dismissing Baehr because there were thirteen impaneled jurors before Baehr was dismissed and Baehr said that she was unable to reach a decision on moral grounds. Thus, the court preserved an impartial jury with twelve jurors by dismissing Baehr. Finally, the State argues that even if Poblitz's constitutional rights were violated, the error was harmless because Poblitz indisputably received a trial by twelve impartial jurors. We agree that any error in questioning and dismissing Baehr was harmless.[3] *See* ***State v. Anderson,*** 2006 WI 77, ¶¶112-16, 291 Wis. 2d 673, 717 N.W.2d 74 (claims of trial court error for communicating with jury outside presence of defendant and counsel subject to harmless error analysis). We therefore do not reach the question of whether the trial court actually erred in questioning and dismissing Baehr. *See* ***State v. Ruiz***, 118 Wis. 2d 177, 198, 347 N.W.2d 352 (1984).

[2] Poblitz also argues that if he is deemed to have waived his objection to the court's questioning and dismissing Baehr, his counsel was ineffective. We conclude that if the trial court erred by questioning and dismissing Baehr, the error was harmless. We therefore do not reach Poblitz's ineffective assistance of counsel claim.

[3] The State asks us to hold that deviation from the procedures set forth in ***State v. Lehman***, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), is subject to a harmless error analysis. Poblitz does not reply to this argument, only arguing that the error in this case is structural and thus not subject to a harmless error analysis. For the reasons set forth below, we conclude that the error complained of in this case is subject to harmless error review.

¶8 Poblitz contends that the trial court's error in questioning and dismissing Baehr was structural error and therefore *per se* prejudicial, thus requiring reversal. *See* ***State v. Shirley E.***, 2006 WI 129, ¶62, 298 Wis. 2d 1, 724 N.W.2d 623. While recognizing that Wisconsin has consistently applied a harmless error analysis to a trial court's communication with jurors outside the presence of the defendant or counsel, *see*, *e.g.*, ***Anderson***, 291 Wis. 2d 673, ¶¶112-16, Poblitz seeks to distinguish these cases by arguing that here, the trial court dismissed a juror because she said that she was not convinced by the State's evidence. Thus, Poblitz contends, the court "stacked the deck" against him, seriously effecting the fairness of his trial. We disagree with Poblitz's characterization of the evidence. Baehr did not say that she was unconvinced by the State's evidence; she said that she could not reach a decision either way, on moral grounds. Thus, we need not decide whether a court's dismissing a juror because he or she favors one side over the other is structural error, as that question is not presented by the facts of this case.

¶9 Poblitz next argues that even if a harmless error analysis applies, the errors here are not harmless because the State has not proven beyond a reasonable doubt that dismissing Baehr did not contribute to the verdict. *See* ***id.***, ¶114. Again, Poblitz argues that Baehr's expression of doubt as to the State's evidence indicated that the result may have been different if she had remained on the jury. The State responds that the focus of our harmless error analysis is on the jurors who sat on the case, not on the dismissed juror.[4] *See* ***State v. Tulley***, 2001 WI

[4] In reply, Poblitz contends that the State's focus on the remaining jurors means that a court is free to question the jurors about their decision after evidence is presented but before the case is submitted, and then dismiss jurors who favor one side or the other. Again, those facts are not presented by this case, and we do not address that argument.

App 236, 248 Wis. 2d 505, 635 N.W.2d 807. Because Poblitz does not contest that the jurors who sat on the jury were anything but impartial, the State asserts, any error was necessarily harmless.[5] We agree with the State.

¶10 In ***Tulley***, the trial court conducted *voir dire* of three potential jurors in chambers, outside the presence of counsel or Tulley, and dismissed each potential juror for cause. ***Id.***, ¶3. We held that even though Tulley had a constitutional right to be present during the *voir dire*, the trial court's error was harmless. ***Id.***, ¶¶6-11. We explained that the court's *in camera* questioning of the jurors was harmless because none of the three prospective jurors actually served on the jury and the defendant was present during the entire *voir dire* of all prospective jurors who actually served on the panel that convicted him.[6] ***Id.***, ¶11.

¶11 Here, the trial court questioned Baehr, an impaneled juror, outside the presence of Poblitz or his counsel. During this conversation, Baehr said that she was unable to perform her duties as a juror. Baehr was excused for cause, which left twelve jurors to deliberate the case. Poblitz and his counsel were present during the *voir dire* of the remaining twelve jurors. There is no contention

[5] The test for harmless error has been stated alternately by the supreme court as "whether there is a reasonable possibility that the error contributed to the outcome" and whether it is "clear beyond a reasonable doubt that the result of the proceeding would not have been the same absent the error." ***State v. Anderson***, 2006 WI 77, ¶130, 291 Wis. 2d 673, 717 N.W.2d 74 (Roggensack, J., dissenting) (citation omitted). In this case, there is no possibility of any prejudice, as Baehr was dismissed for cause, on moral grounds, from a group of thirteen impaneled jurors before the case was submitted to the jury. Thus, under either test, any error was harmless.

[6] In ***State v. Tulley***, 2001 WI App 236, 248 Wis. 2d 505, 635 N.W.2d 807, Tulley argued only that the court's questioning the jurors outside of his presence was error, not that the court erred in discharging the jurors. Here, Poblitz claims the court erred in both questioning and discharging Baehr outside of his presence. Because the impaneled jury in this case had thirteen members, and Baehr was discharged for moral reservations, we agree with the State that this case is resolved on the same issue as was ***Tulley***: that the remaining jury was indisputably fair and impartial.

that the jury which actually sat on the case was anything other than fair and impartial. Because Baehr was discharged for cause, leaving twelve remaining impartial jurors, we conclude that the State has met its burden to prove that any trial court error in questioning and discharging Baehr was harmless. Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.