**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

April 8, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-0116-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**GARY L. PARSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Gary L. Parson has appealed from a judgment convicting him after a jury trial of one count of burglary with intent to commit a felony in violation of § 943.10(1)(a), STATS.; one count of substantial battery in violation of § 940.19(3), STATS.; one count of false imprisonment in violation of § 940.30, STATS.; and one count of criminal trespass to a dwelling in violation of

§ 943.14, STATS. All of the convictions were as a party to the crime under § 939.05, STATS. Parson was sentenced to two years in prison on the false imprisonment count, ten years in prison for the burglary count, nine months in prison for the criminal trespass count, and five years in prison for the battery count, all of the sentences imposed consecutively. However, the latter sentence was stayed in favor of a five-year consecutive probation period. Parson has also appealed from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

Parson's first issues relate to the trial court's decision to strike two jurors for cause. The first was Diane Young, a prospective juror struck during voir dire on motion of the State. The second was a man who informed the trial court of health problems after the jury was selected.

Whether a prospective juror is biased and should be dismissed for cause is a matter lying within the trial court's discretion. *See* ***State v. Ramos***, 211 Wis.2d 12, 15, 564 N.W.2d 328, 330 (1997). Section 805.08(1), STATS., requires the court to excuse a juror who is not indifferent in the case. Bias may be either implied as a matter of law or be actual in fact. *See* ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). Even the appearance of bias must be avoided. *See* ***id.*** at 478, 457 N.W.2d at 488.

A juror who expresses an opinion or bias may still serve on the jury if the person can lay aside his or her opinion or bias and render a verdict based on the evidence presented in court. *See* ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733-34 (1979). However, the determination of the subjective sincerity of a prospective juror in answering whether he or she can be fair and impartial is also a matter within the trial court's discretion. *See* ***id.*** at 33, 280

N.W.2d at 734. A trial court must honor challenges for cause whenever it may reasonably suspect that circumstances outside of the evidence may create bias or the appearance of bias. *See* ***Nyberg v. State***, 75 Wis.2d 400, 404, 249 N.W.2d 524, 526 (1977).

When asked during voir dire whether she knew a family member of any party, Young stated that she was acquainted with family members of "Jalahl," referring to Parson's codefendant, Jalahl Jackson. She testified that she knew his mother, grandmother, cousin and "mostly the whole family." She testified that she had known Jackson's aunt for four or five years and that the aunt used to live upstairs from her. Young indicated that Jackson himself had lived in his aunt's apartment, although her answers were somewhat unclear as to whether Jackson lived there while Young resided in the building. Young also testified that Jackson's counsel had represented her own son during the previous year.

The trial court struck Young for cause based on her acquaintance with Jackson and his family and because Jackson lived in the same building as her at some time. We conclude that the trial court acted properly within the scope of its discretion. While Young stated that her acquaintance with Jackson's family and his counsel would not affect her judgment, the trial court could reasonably determine that in light of the duration and extent of Young's acquaintance with various family members of Jackson, she could not credibly claim to be unaffected

by these relationships.[1] At a minimum, an appearance of bias was created which warranted striking her for cause.

We also conclude that the trial court properly struck the juror who raised health concerns after the jury selection but before the jury was sworn. In response to questioning by the trial court and counsel, this juror indicated that he suffered from anxiety attacks and that sitting around "bother[ed]" him, causing him to become upset and angry. When asked to describe his attacks, he indicated that his heart "starts beating like crazy," he suffered headaches, and he became hot and nervous. He stated that he was under the care of a general practitioner for this condition and was being treated with a prescription medication, which he offered to produce. He stated that before his current condition was diagnosed he had been to the hospital four times believing that he had heart problems. He also indicated that he had an anxiety attack after finding out that he was going to be a juror.

Based on these questions and answers, the trial court properly determined that this juror suffered from health problems which rendered him infirm and warranted striking him from the case. *See* § 756.01(1), STATS. Because this juror and Young were properly struck for cause, no violation of Parson's rights occurred under ***Batson v. Kentucky***, 476 U.S. 79 (1986). As acknowledged by Parson, ***Batson*** bars the use of peremptory strikes to remove

[1] In support of his contention that the State's motion to strike Young must have been based on race or gender rather than bias, Parson relies on the fact that the State did not move to strike three jurors who knew members of the district attorney's office or a police officer who was a witness in the case. However, even if their slight acquaintance could be deemed sufficient to give rise to partiality, it is not the obligation of the State to move to strike potential jurors who might be favorable to it. In addition, the State's failure to move to strike a juror who testified that Jackson's counsel had represented family friends sometime during the last five years provides no basis to question the striking of Young because this juror's single weak connection to defense counsel cannot be deemed comparable to Young's connections to one of the defendants and his counsel.

prospective jurors solely on the basis of race. *See* ***id.*** at 89. It does not guarantee that an accused of one race will have jurors of the same race in the jury box. *See* ***id.*** at 85. Moreover, having concluded that the trial court properly struck these jurors for cause, we also reject Parson's contention that he was entitled to a mistrial based on the trial court's decisions.

Parson's next arguments relate to the testimony of Mario Echols and Thomas Glassman. The charges against Parson were based on evidence that he held some rank in the Gangster Disciples street gang and that he entered the apartment of Jerome Pompey and directed other gang members, including Jackson, to take Pompey outside and beat him. Evidence indicated that Parson directed the beating of Pompey because Pompey had interfered with the beating of Echols, who was a rival gang member and had been perceived as showing a lack of respect for the Gangster Disciples by the manner in which he wore his hat.

Glassman, a Kenosha police officer assigned to the gang crimes unit, testified before Echols at trial. In direct examination by the prosecutor, Glassman testified that Larry Hoover was the chairman of the board of the Gangster Disciples, that he was in prison in Chicago, and that from there he appointed governors for the gang in Chicago and other areas in the Midwest. On cross-examination, defense counsel elicited from Glassman that Hoover had been in custody since 1973, more than twenty years. Subsequently, Glassman reiterated on redirect examination that Hoover had been in custody since the 1970's. The prosecutor then asked him whether Hoover's status had changed "last summer," referring to the summer before these Labor Day offenses were committed. Defense counsel objected based on relevancy and hearsay, but the trial court permitted Glassman to answer on the grounds that the subject was introduced by the defense. Glassman then testified that Hoover was transferred from a state

penitentiary to a federal penitentiary on August 29, 1995, as a result of thirty-nine indictments filed against the Gangster Disciples in Chicago. Glassman testified that these indictments would have a devastating effect on the gang as a whole, that at such a time an organization would not want to appear weak, and that, in his opinion, the organization would send messages to other factions of the gang to flex their muscles to demonstrate strength and to take appropriate measures against rival gangs. Although Glassman testified that he had no proof that such messages were sent to anyone in this case, he testified that Echols told him that the "word was out" that the Gangster Disciples had to remain strong and deal with the enemy. Subsequently, Echols personally testified, stating that conflict between the gangs had increased when Hoover was "busted" and that "the word on the street" was that the Gangster Disciples were going to be starting trouble all over in an attempt to show power.

On appeal, Parson contends that the trial court erred when it determined that the defense had introduced the subject of the change in Hoover's status on cross-examination. We agree. However, a trial court has broad discretion with respect to the scope of redirect examination. *See* ***State v. Cydzik***, 60 Wis.2d 683, 690, 211 N.W.2d 421, 426 (1973). It may permit redirect examination to go beyond the scope of cross-examination even though the testimony should have been brought out in direct examination. *See* ***id.*** at 690 n.10, 211 N.W.2d at 426. It may allow a party to supply testimony omitted by oversight or allow a witness to expand his or her testimony where the facts are not inconsistent with the witness' previous answers. *See* ***id.***

Glassman's testimony as to the change in Hoover's status was properly admitted under these standards.[2] Moreover, it was relevant to the State's theory that the Gangster Disciples had to show some force to compensate for the loss of face or authority which might arise from Hoover's transfer and indictment. It thus established a motive for Parson to direct a beating of Pompey when he interfered with the exercise of that power in the beating of Echols. Because Parson could and did conduct recross-examination on this subject, the fact that the subject was initiated in redirect examination provides no basis for disturbing Parson's judgment of conviction.

Parson objects that the testimony from Echols and Glassman regarding the "word on the street" constituted hearsay and violated his constitutional right to confront witnesses against him. However, hearsay is defined as "a statement … offered in evidence to prove the truth of the matter asserted." *See* § 908.01(3), STATS. It does not prevent a witness from testifying as to what he or she heard; rather, it constitutes a restriction on the proof of a fact through extrajudicial statements. *See* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 427, 351 N.W.2d 758, 765 (Ct. App. 1984).

Echols' testimony that the "word on the street" was that the Gangster Disciples were going to be starting trouble in an attempt to show power was not introduced to prove the truth of the matter asserted, namely, that Hoover was being indicted and transferred and that the Gangster Disciples felt compelled to

[2] We recognize that the trial court relied on a misapprehension as to the scope of defense counsel's cross-examination in admitting this testimony. However, an appellate court may sustain a trial court's ruling on a theory or reasoning not presented to the trial court, even when the trial court's reasoning was incorrect. *See* ***State v. Holt***, 128 Wis.2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985).

make a show of force as a result. Instead, it was admitted simply to prove that people were saying these things. *Cf.* ***id.*** The fact that people on the street were saying that the Gangster Disciples needed or wanted to make a show of force made it more likely that Parson also heard and believed that the Gangster Disciples were having trouble, that the authority of their organization was being challenged, and that they should take action against their rivals to counteract the challenge. Evidence that Parson heard this type of talk also made it more likely that he would direct action against Pompey when Pompey attempted to intervene to protect someone who was perceived as showing a lack of respect for the Gangster Disciples.

Parson contends that Glassman's testimony repeating what Echols told him also constituted inadmissible hearsay. However, after Glassman completed his testimony, Echols testified concerning the "word on the street" and was subject to cross-examination on that subject. Consequently, any error arising from Glassman's reiteration of what Echols said was harmless and provides no basis for relief.

Parson next objects to a statement made by the prosecutor during closing argument indicating that Parson and Michael G. Harvey, a ranking member of the Gangster Disciples, had a close relationship. Parson contends that there was no evidence in the record that they knew each other or shared a close relationship.

Counsel is allowed considerable latitude in closing argument with discretion given to the trial court in determining the propriety of the argument. *See* ***State v. Draize***, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). The prosecutor may comment on the evidence, detail the evidence and argue from it to

a conclusion. *See* ***id.*** Argument becomes impermissible when the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***id.***

It was not improper for the trial court to overrule Parson's objection to the prosecutor's statement. In his opening argument, counsel for Parson contended that Harvey, not Parson, directed the actions of the Gangster Disciples and that this was why Pompey had identified Harvey but not Parson in a photo array after the crimes. Subsequently, in his questioning of Pompey and Glassman, Parson's attorney elicited testimony indicating that Pompey had identified Harvey rather than Parson as the leader of the Gangster Disciples. However, on redirect examination, Glassman testified that he knew Harvey, that Harvey had been sitting in the courtroom earlier in the trial, and that he had seen Harvey and Parson together in the past.

The testimony that Harvey had been seen together with Parson, that Harvey attended a portion of the trial as a spectator, and that both Harvey and Parson were Gangster Disciples members and leaders clearly supported the prosecutor's argument. No basis therefore exists to conclude that the prosecutor's brief comment denied Parson his due process right to a fair trial.

Parson's final arguments relate to sentencing. The trial court sentenced him on the false imprisonment count immediately after trial. He was subsequently returned to court after the preparation of a presentence investigation report for sentencing on the remaining counts.

Parson challenges the trial court's decision to proceed to immediate sentencing on the false imprisonment charge on the grounds that it did not afford

him or his attorney adequate time to prepare a sentencing argument, to present information regarding his background, or to investigate the accuracy of information presented by the State. He also contends that the trial court's action in proceeding to sentencing on one count while indicating that a presentence report was necessary on the remaining counts bespoke a preconceived commitment to incarceration which was closed to individual mitigating factors.

In ***State v. Kourtidias***, 206 Wis.2d 574, 588, 557 N.W.2d 858, 864 (Ct. App. 1996), this court declined to disturb a sentence imposed immediately after sentencing merely because a presentence report was deemed necessary by the trial court on another charge but which had not yet been prepared. Moreover, assuming that the procedure followed by the trial court of proceeding to immediate sentencing was error, Parson has not shown that it was prejudicial to him in any manner. A defendant's due process rights at sentencing are: (1) to be present at the hearing and to be afforded the right to allocution; (2) to be represented by counsel; and (3) to be sentenced on the basis of true and correct information. *See* ***Bruneau v. State***, 77 Wis.2d 166, 174-75, 252 N.W.2d 347, 351 (1977). Parson's counsel was afforded an opportunity to make a sentencing argument and Parson was afforded the right to allocution at the first sentencing. Moreover, this first sentencing was followed by a more detailed hearing on the remaining convictions where a presentence report was used.

Nothing in Parson's argument indicates that the trial court relied on inaccurate information at the first sentencing. Most importantly, Parson fails to show what he would have done differently if immediate sentencing had not occurred or to provide any basis to believe that a different sentence would have resulted. The record indicates that the trial court considered proper sentencing factors, thus belying any claim that it was predisposed to incarcerate for the false

imprisonment offense without considering the facts of this individual case. Because Parson also fails to argue and demonstrate that the sentence imposed was unreasonable under the facts or otherwise constituted an erroneous exercise of discretion, no basis exists to disturb the false imprisonment sentence.

Parson's final argument is that the sentences imposed on the remaining counts must be set aside because they were based on the trial court's erroneous belief that he was on probation for an Illinois offense when he committed these crimes. A defendant who claims that he or she was sentenced based on inaccurate information must prove that the information was prejudicial as well as inaccurate. *See* ***State v. Coolidge***, 173 Wis.2d 783, 789, 496 N.W.2d 701, 705 (Ct. App. 1993). No prejudice has been shown here. The record reveals that Parson committed these offenses while a drug charge was pending against him in Illinois, only nine days before he pled guilty and was placed on probation in that case. It cannot seriously be contended that Parson's commission of these crimes while the Illinois charge was pending is less of an aggravating factor for purposes of sentencing than having committed the crime while on probation.[3] Moreover, Parson never objected to or attempted to correct the inaccuracy at sentencing and therefore is not entitled to relief based upon it. *See* ***State v. Johnson***, 158 Wis.2d 458, 470, 463 N.W.2d 352, 358 (Ct. App. 1990).

[3] A trial court may consider other criminal conduct at sentencing, even if that conduct is the subject of pending charges. *See* ***Handel v. State***, 74 Wis.2d 699, 702-03, 247 N.W.2d 711, 713-14 (1976).

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.