COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3102-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. MASINI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

VERGERONT, J.[1] David Masini appeals a judgment of conviction for disorderly conduct in violation of § 947.01, STATS. He contends that the trial court erred when it decided not to dismiss a juror for cause. We conclude that the

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

trial court did not erroneously exercise its discretion in deciding not to dismiss the juror, and we therefore affirm the conviction.

BACKGROUND

Masini was charged with misdemeanor battery and disorderly conduct[2] as a result of an altercation between Masini and an employee of a McDonald's restaurant. The altercation occurred at the drive-up window at the restaurant. The jury found Masini guilty of disorderly conduct but not guilty of battery. This appeal concerns the selection of the jury, and, in particular, juror Gaylen Rogness.

The court began questioning the prospective jurors, first explaining that if the answer to any questions it asked was "yes," that individual should raise a hand. After questioning the prospective jurors about acquaintance with the parties, attorneys and witnesses, the court asked the following questions and received the following responses:

> THE COURT: Any among you who has a feeling of any bias or prejudice for or against either the defense, Mr. Masini, or the State of Wisconsin, Mr. Roemer and Mr. Jackson?
>
> THE PANEL: No response.
>
> THE COURT: Any among you who is a member of a police department, sheriff's department, similar type law enforcement agency. Mr. Rogness.
>
> JUROR GAYLEN ROGNESS: Deputy Sheriff 28 years ago in Chicago.
>
> THE COURT: When did you retire?
>
> JUROR GAYLEN ROGNESS: 3 years

[2] There was also a charge of criminal damage to property, which the State dismissed before trial.

> THE COURT: Anything about your experience as a Deputy Sheriff going to mean you can't be impartial and fair in this case?
>
> JUROR GAYLEN ROGNESS: Try not to.
>
> THE COURT: That is all we can ask, not give greater weight to law enforcement officers testimony just because they happen to be law enforcement officer?
>
> JUROR GAYLEN ROGNESS: Try not to.
>
> THE COURT: You think you can put that aside and listen to the evidence and make a decision based upon the evidence whatever it is?
>
> JUROR GAYLEN ROGNESS: I try not to.

Masini's counsel did not request that Rogness be excused or request individual voir dire of Rogness during or immediately following this exchange. The court continued with its questions, during the course of which it asked these questions of the entire pool:

> THE COURT: Anybody else, right now, sitting there right now, any among you formed an opinion, have formed an opinion as to the guilt or innocence of this defendant, David Masini?
>
> THE PANEL: No response.
>
> THE COURT: Anybody among you who cannot or will not try this case fairly and impartially on the evidence that is given here in this courtroom, under the instructions of this court and render a just and true verdict?
>
> THE PANEL: No response.

The prosecutor then asked questions of the prospective jurors, covering certain of Masini's constitutional rights, and ending with these questions:

> [PROSECUTOR] Lastly, anyone listening to what has gone on that feels for whatever reason, conscience, morally, they couldn't sit in judgment and render a fair and just verdict both for Mr. Masini and the state?
>
> A No response.
>
> [PROSECUTOR] Anyone feel that way right now?

> A No response.
>
> [PROSECUTOR] Everyone comfortable they could sit in judgment on the case without having any passion or prejudice?
>
> A No response.

Masini's counsel began his questioning by emphasizing the importance of the prospective jurors telling the attorneys and the judge if for any reason they felt they could not be fair. In response to questions whether anyone believed that if someone is charged with a crime they are probably guilty and whether anyone had prejudged any of the witnesses or testimony based on the court's initial description of the case, no one on the panel responded. When defense counsel asked whether anyone believed that a police officer's testimony should be given greater weight than the average citizen, no one responded, although certain prospective jurors, not Rogness, did respond to follow-up questions about believing it more likely that a police officer as compared to the average citizen tells the truth.

Masini's counsel eventually asked about experiences with being sworn at in restaurants or other businesses. After a couple of persons responded, relating their experiences, this exchange took place:

> JUROR GAYLEN ROGNESS: Yes, I have been sworn at at several places, restaurant, bar, we had confrontation.
>
> [DEFENSE COUNSEL]: Been like disorderly conduct, something like that?
>
> JUROR GAYLEN ROGNESS: Yes.
>
> [DEFENSE COUNSEL]: Would that being involved in situations like that cause you any bias?
>
> JUROR GAYLEN ROGNESS: I have been involved with same situations as this, I have been in 20 years of law enforcement that I have been doing it, it is boardline, I will try not to.

> [DEFENSE COUNSEL]: When you try to, are you completely sure that you can put those situations aside and just rule upon what you hear here today, or those situations some how possibly affect you in this matter?
>
> MR. GAYLEN ROGNESS: Depends on the testimony, come back in recall some of the things I done before.
>
> [DEFENSE COUNSEL]: Your Honor, I move to have Mr. Rogness excused for cause.
>
> [PROSECUTOR]: That is common experience that people have, we can't strip ourself of that, we feel things for different things.
>
> THE COURT: All right, Mr. Rogness, you understand that your duty as a juror, as indicated before, is to decide the case based upon what you hear in court today?
>
> MR. GAYLEN ROGNESS: Yes.
>
> THE COURT: I am not going to excuse Mr. Rogness on that ground, because common, we all have experiences, and I will let it stand there.
>
> [DEFENSE COUNSEL]: No further questions.

Masini used his first preemptory challenge to remove Rogness from the jury. After the jury returned a verdict of guilty on the disorderly conduct charge, Masini moved for a new trial on the ground that Rogness should have been dismissed for cause and the court's error in not doing so deprived Masini of all his preemptory challenges.

At the hearing on this motion, Masini's trial counsel testified. He explained that, although he considered Rogness' answers to the court's initial questions to be "objectionable under the law," he did not move to strike Rogness at that point for two reasons. First, based on his experience with the particular presiding judge, that judge would not excuse a prospective juror with a law enforcement background who stated that he or she would try to put experience as a law enforcement officer out of mind in deciding the case. Second, he "wanted to have a greater chance to develop into what, where his bias fell basically, in

relation to the comment which he made, I stated, my recollection, he would have been a Chicago Police Officer, I had some feeling that his bias could actually fall against the state and in favor of Mr. Masini based on that."

Defense counsel explained his ultimate decision to move to strike Rogness for cause in this way:

> A I felt that his, when you are picking a jury you go on a lot of different feelings that you get from answers which witnesses make, or excuse me, prospective jurors make, and I felt that I could not put his, basically his answer that he was going, he did have bias, the bias could possibly fall against my client, and that he stated he couldn't put them out of his mind, I wanted an unbiased juror, I moved to strike him for cause.
>
> Q Were you basing those on the comments that he just made immediately before your motion or based upon his entire comments?
>
> A The entire line of comments which he had made.

After listening to the testimony of Masini's trial counsel and to argument of the prosecutor and Masini's postconviction counsel, the court denied Masini's motion. The court described Rogness' responses as "at best … ambiguous" when "looking at a bare transcript." However, in the court's view, because the court and counsel were present, they were able to observe Rogness' demeanor and appearance when he made these statements. The court acknowledged that Rogness "was probably not as competent of the English language as attorneys are, [but] he was making himself clear as best he could." The court pointed out that Rogness was under voir dire oath,[3] and had been informed of his obligation to truthfully respond to the court's and counsel's

[3] *See* § 756.098(1), STATS.

questions. The court stated that it recalled the situation well. The court concluded that the answers Rogness gave were that he would try to be fair and impartial, and his demeanor indicated to the court that he was being truthful and would be a fair and impartial juror.

DISCUSSION

A defendant in a criminal case is entitled to an impartial jury under both the Sixth Amendment to the United States Constitution and under Article I, Section 7 of the Wisconsin Constitution. ***Hammill v. State***, 89 Wis.2d 404, 407, 278 N.W.2d 821, 822 (1979). In addition, under § 805.08(1), STATS., a 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" should be removed from the panel. ***State v. Ramos***, 211 Wis.2d 12, 16, 564 N.W.2d 328, 330 (1997).

The question of whether a juror is biased and should be dismissed for cause is within the trial court's discretion. ***Ramos***, 211 Wis.2d at 15, 564 N.W.2d at 330. The trial court must be satisfied that it is more probable than not that the juror is biased. ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). The determination of juror impartiality rests heavily on the demeanor of the potential juror during voir dire and is particularly within the province of the trial judge. ***Hammill***, 89 Wis.2d at 415-16, 278 N.W.2d at 826. A determination by the trial court that a prospective juror can be impartial should be reversed only where bias is "manifest." ***Louis***, 156 Wis.2d at 478-79, 278 N.W.2d at 488.

Masini argues that the trial court erroneously exercised its discretion in deciding not to remove Rogness for cause. First, Masini addresses Rogness' answers to the court's initial questions, when Rogness answered "try not to" to questions asking whether he could be fair and impartial and whether he could put

his law enforcement experience aside and make a decision based on the evidence. Masini argues that these answers show either that Rogness was "candidly confessing his inability to be fair" or, at best, that he misspoke because he did not understand the questions or was not listening. We do not believe there is any reasonable argument that Rogness meant to say that he tries not to be fair and impartial. The defense counsel's testimony shows that he understood that Rogness meant he would try to be fair and impartial and try to set his law enforcement background aside, and the court also stated that that is what the court understood.

The court's finding that any ambiguity that might appear from the "bare transcript" arose from a lack of facility with language is supported by a reading of Rogness' three answers to the court's initial questions. The first question to him used two negatives ("Can't" and "impartial"). It is not surprising that someone unfamiliar with such terms and phrasing would be confused about whether a negative was needed in the answer. The record shows that the court took Rogness' answer to mean that he would try to be fair and impartial, because the court's next question was: "That is all we can ask, not give greater weight to law enforcement officers' testimony just because they happen to be law enforcement officers?" This question did not have two negatives, and Rogness' answer "try not to" is not ambiguous. The third question shifts form again, so that if Rogness' answer is taken literally, he was telling the court that he tries not to put aside his law enforcement experience and listen to the evidence and make a decision based on the evidence. If the attorneys or the court thought at the time that that is what Rogness really meant, we have no doubt that the questioning would not have immediately moved on to other subjects with no follow up to this answer.

Masini next argues that even accepting that Rogness meant that he would try to be fair and impartial in these answers, that is not sufficient because that is not an unequivocal commitment to do so. He cites ***State v. Traylor***, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992); ***State v. Ferron***, 214 Wis.2d 268, 570 N.W.2d 883 (Ct. App. 1997) (pet. rev. pending), and ***State v. Zerfluh***, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986), in support of this argument.

In each of these cases we reversed a trial court's decision not to dismiss a juror for cause, concluding that the trial court had not followed up with questions to conclusively determine that the prospective juror would follow the law as instructed by the court rather than his or her biases or personal beliefs about justice. *See* ***Zerfluh***, 134 Wis.2d at 438, 397 N.W.2d at 155; ***Traylor***, 170 Wis.2d at 399, 489 N.W.2d at 628; ***Ferron***, 214 Wis.2d at 399, 570 N.W.2d at 887. However, in each of these cases the juror expressed either reservations about her ability to be fair (***Id.***) or a belief that was inconsistent with the defendant's constitutional rights (***Ferron***, 214 Wis.2d at 272-73, 570 N.W.2d at 887; ***Traylor***, 170 Wis.2d at 398-99, 489 N.W.2d at 399). In this case, when Rogness answered the court's questions saying he would try to be fair and impartial and make a decision based on the evidence, he had not given any indication he would have difficulty doing this, and indeed had not responded when the court earlier asked if anyone had a feeling of bias or prejudice against the defendant.

Masini next addresses Rogness' responses to defense counsel's questions, arguing that these also show a bias or lack of indifference. Masini claims that Rogness equivocates in his first answer. Masini interprets "boardline" as "borderline" and as describing Rogness' efforts, such that in Masini's view, Rogness is saying, "he will try not to [be biased by his prior experience with similar situations as a law enforcement officer] but it is borderline [whether he

can]." Masini reads Rogness' next answer as further equivocating, unable to say that he would not be biased by past experiences. There are, however, alternative readings of both these answers, such that Rogness is saying he is not sure that he can forget his past experiences in law enforcement ("depends on the testimony, come back in recall some of the things I done before") but he will try to set them aside and decide only on the evidence. Under this interpretation (which is how the court, based on its comments at the postconviction motion hearing, did interpret them) Rogness is repeating what he has said earlier: he is acknowledging his law enforcement experience and stating that he will try to be fair.

As we have said earlier, we do not agree that the case law requires more than this, when there has been no expression by a juror of bias or personal beliefs inconsistent with the defendant's constitutional rights. The fact of prior law enforcement experience does not, in itself, show a bias or create presumptions of bias. *See* ***Louis***, 156 Wis.2d at 480, 457 N.W.2d at 488. Also, by the time Rogness answered the defense counsel's questions, there had been a number of intervening questions by both the prosecutor and the defense counsel asking whether any juror would have problems in carrying out various aspects of the duty to be an unbiased decision maker. Rogness had not responded to those questions, thus indicating that he would not have such problems.

At this point, defense counsel moved to strike for cause and the court asked:

> THE COURT: All right, Mr. Rogness, you understand that your duty as a juror, as indicated before, is to decide the case based upon what you hear in court today?
>
> MR. GAYLEN ROGNESS: Yes

> THE COURT: I am not going to excuse Mr. Rogness on that ground, because common, we all have experiences, and I will let it stand there.
>
> [DEFENSE COUNSEL]: No further questions.

After Rogness answered in the affirmative, the court decided not to excuse Rogness for cause. The court's explanation makes it evident that the court understood Rogness' answer to the defense counsel's questions to express uncertainly about whether he could forget his past experiences, not uncertainty whether he could decide the case on the evidence before him. Masini argues, however, that the court did not obtain the unequivocal assurance of fairness from Rogness that was required because the court did not follow up its question by asking Rogness whether Rogness could do what he said he knew to be his duty.

While it might have made for a more complete record had the court followed its last question to Rogness with the one Masini now suggests, we do not see that omission as precluding the court from properly determining that Rogness was a fair and impartial juror. The court evidently understood that Rogness' affirmative answer meant that he could carry out the duty, and defense counsel did not ask any further questions.

We do not agree with Masini that the trial court here is using demeanor to "fundamentally alter the substance of what the juror said." Rather, Rogness' use of language created certain ambiguities. It is a proper role for the court—which was present, asked questions, saw and heard the attorneys asking questions, and saw and heard Rogness responding to the questions—to decide whether the ambiguities arose from Rogness' lack of language fluency and facility or from an equivocation about his ability or desire to be a fair and impartial juror. The court's determination that the ambiguities arose from the former are supported

by the record and we defer to that. We do not agree with Masini that the court's reliance on Rogness' demeanor to interpret his comments and his truthfulness are somehow inappropriate as "insulating" its decision from review. The importance of demeanor in deciding juror impartiality is precisely one of the reasons it is committed to the trial court's discretion. *See* ***Hammill***, 89 Wis.2d at 415-16, 278 N.W.2d at 826. We conclude that the court could did not erroneously exercise its discretion in deciding that Rogness would be a fair and impartial juror.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.