COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2460-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERRY C. LOVE,

DEFENDANT-APPELLANT,

SHAWNDON JOHNSON AND
NATHANIEL BEARDON, JR.,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Perry C. Love appeals from a judgment of conviction for receiving stolen property and from an order denying his motion to modify his sentence. Love raises three claims of error: (1) the trial court erroneously exercised its discretion when it refused to remove a juror for cause; (2) the evidence presented at trial was insufficient to establish that he was guilty of receiving stolen property; and (3) the trial court erroneously exercised its sentencing discretion by considering improper factors.

¶2 Because the challenged juror's bias was not manifest, the evidence was sufficient to support the conviction for receipt of stolen property, and the trial court did not consider improper factors in its sentence, we affirm.

I. BACKGROUND

¶3 The State charged Love with receiving stolen property having a value of more than $2,500, as party to a crime. The charge was based on testimony of police officers and citizen witnesses who claimed to have observed Love and his two accomplices remove personal property from a GMC van owned by Derrick McDowell, the victim of this incident, and load it into the Chevrolet Suburban belonging to Love.

¶4 A jury trial was scheduled for Love and one of his accomplices, Shawndon Johnson. During voir dire, a juror named Strack was questioned for bias by attorneys for both Love and Johnson. Based upon Strack's responses to the two defense counsel and the court, Love's counsel requested that Strack be removed for cause. The trial court denied the request. Thereafter, Love exercised his first peremptory strike to remove Strack from the jury.

¶5 The jury found Love guilty of the charge and the trial court sentenced him to seven years in a Wisconsin state prison. Love filed a postconviction motion to modify his sentence, which was denied. He now appeals.

II. ANALYSIS

A. Juror Challenge.

¶6 Love first claims that the trial court committed reversible error under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997), when it refused to remove juror Strack for cause after he repeatedly indicated that he was unwilling to apply the constitutional principles of the presumption of innocence and the defendant's right to remain silent.

¶7 A trial court's decision to deny a requested strike-for-cause may only be overturned when the challenged juror's bias is manifest. *See* ***State v. Ferron***, 219 Wis.2d 481, 496-97, 579 N.W.2d 654, 660 (1998). "Manifest bias" is determined under a two-part test. A trial court's decision to deny a requested strike-for-cause should be affirmed if the record supports a finding that "the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; [and] … a reasonable person in the juror's position could set aside the opinion or prior knowledge." ***Id.*** at 498, 579 N.W.2d at 661.

¶8 Thus, the first inquiry is whether the prospective juror is willing to put aside bias based on an "opinion or prior knowledge." In practical application there is no litmus test for this determination, nor any required verbal response demonstrating the prospective juror's disassociation from perceived expressions of bias. *See* ***id.*** at 501-02, 579 N.W.2d at 662.

¶9 The second inquiry that the trial court must conduct is whether, under all of the circumstances, a reasonable person could set aside the bias. *See* ***id.*** Whether a prospective juror is biased and ought to be dismissed from a jury panel for cause is ultimately a matter of trial court discretion. *See* ***id.*** at 499, 579 N.W.2d at 661. For reasons set forth, the trial court did not erroneously exercise its discretion in refusing to strike prospective juror Strack.

¶10 We first set forth the pertinent portions of the voir dire relating to juror Strack:

> [DEFENDANT'S COUNSEL]: Now, there are some constitutional principles involved here. For example, is there anybody who believes that the presumption of innocence that [the assistant district attorney] spoke about should not apply, that Mr. Love is innocent? Does everybody appreciate that this is an innocent man? Anybody disagree that he's an innocent man right now? Mr. Strack.
>
> JUROR STRACK: Um-hum. Somewhat. I don't think it would get to this extent with Detective Zimmerman. It wouldn't be here if there wasn't a great deal of evidence against these people.
>
> [DEFENDANT'S COUNSEL]: You haven't heard any evidence at all yet, have you?
>
> JUROR STRACK: Well, just on that alone.
>
> [DEFENDANT'S COUNSEL]: And just because they are sitting here, they must have done something wrong. Is that what you're saying?
>
> JUROR STRACK: Well, it's either that way or I'm to presume Detective Zimmerman's a liar.
>
> [DEFENDANT'S COUNSEL]: Well, do you understand that you're to weigh what the facts are?
>
> JUROR STRACK: Oh, yeah.
>
> [DEFENDANT'S COUNSEL]: And that there is this presumption of innocence. Are you saying the presumption of innocence does not apply; is that correct?
>
> JUROR STRACK: Okay.
>
> [DEFENDANT'S COUNSEL]: You can accept --

JUROR STRACK: I'm going to be leaning towards what he says.

[DEFENDANT'S COUNSEL]: Because he's a police officer?

JUROR STRACK: Correct.

[DEFENDANT'S COUNSEL]: And because he's a police officer, he has to be telling the truth; is that correct?

JUROR STRACK: No. But --

[DEFENDANT'S COUNSEL]: Can you clarify that position of yours then.

JUROR STRACK: I think there are a series of checks and balances probably that he has to, you know, it's not him and him alone. However, I believe that it wouldn't get to this point.

[DEFENDANT'S COUNSEL]: Do you understand that the system of checks and balances includes the jury and that you're the decision makers, not the police officer who arrests somebody on the street, but the jury are the ultimate decision makers as to --

JUROR STRACK: I'm saying he had a reason to make the arrest.

[DEFENDANT'S COUNSEL]: Even if he had reason to make the arrest, do you then jump to the conclusion that these people that are sitting before you are guilty of a crime?

JUROR STRACK: I'd have to hear something pretty good from that side, yeah.

[DEFENDANT'S COUNSEL]: You'd have to hear something good from the defense?

JUROR STRACK: From you.

[DEFENDANT'S COUNSEL]: Do you understand that part of the law that Judge Sykes is going to give you is that there is no burden on the defense, that it's not for the defense to provide you with any information, and we need not provide you with anything and that the full burden rests upon [the assistant district attorney] to prove beyond a reasonable doubt that Mr. Love received stolen property beyond a reasonable doubt. Do you understand that that full burden rests with [the assistant district attorney]?

JUROR STRACK: Yes.

[DEFENDANT'S COUNSEL]: And that right now you agree that Mr. Love is innocent; isn't that correct?

You got to believe that in your heart. Do you believe that in your heart? This is an innocent man sitting here?

JUROR STRACK: No.

[DEFENDANT'S COUNSEL]: So what Judge Sykes told you the law is, you can't accept the law? Are you refusing to accept your oath as a juror that you took earlier today?

….

[DEFENDANT'S COUNSEL]: … They did take an earlier oath though to tell the truth during this voir dire process. And Judge Sykes told you that the law is that this man is presumed innocent. Did you accept that as the law?

JUROR STRACK: That's the way it's done, yeah.

[DEFENDANT'S COUNSEL]: Well, do you accept the fact that the [sic] Mr. Love is innocent?

JUROR STRACK: Yeah, okay. He's innocent.

[DEFENDANT'S COUNSEL]: And that the state has to overcome that presumption of innocence.

JUROR STRACK: Correct.

[DEFENDANT'S COUNSEL]: By proof beyond a reasonable doubt?

JUROR STRACK: Correct.

[DEFENDANT'S COUNSEL]: Do you think it's unfair that [the assistant district attorney] has to prove that Mr. Love is anything but innocent by proof beyond a reasonable doubt?

JUROR STRACK: No. I think he probably can do it.

[DEFENDANT'S COUNSEL]: You think he can overcome that presumption; is that what you're saying? You have heard no facts in this case yet, have you?

JUROR STRACK: Well, no, of course not.

[DEFENDANT'S COUNSEL]: And part of what you have to do is hear facts before you can reach conclusions, correct?

JUROR STRACK: The conclusions that I have reached is that we wouldn't be here unless something occurred.

[DEFENDANT'S COUNSEL]: Your Honor, I'm going to ask that Mr. Strack be stricken for cause.

THE COURT: I'm not going to entertain that at this point. I think there is perhaps a misconception at work here between the attorney and the juror. The presumption of innocence is a legal presumption that the jury is required to apply, and it exists for obvious reasons of a constitutional nature, that it is the state's burden to prove the defendant guilty beyond a reasonable doubt, and the jury must be made to understand that they have to apply that legal presumption, the presumption of innocence, in order to hold the state to that burden of proving each and every element of the offense beyond a reasonable doubt before the end of a case a juror independently or as a jury in a group of 12 jurors can ever vote to convict somebody of a crime. And so you need to be committed as a juror to apply presumption of innocence and to hold the state to the burden of proof the law requires it in order to convict the defendant which is proof beyond a reasonable doubt.

Do you think you can do that, sir, regardless of what kind of thoughts are going through your mind about what the investigation in this case might or might not have involved and what the prior proceedings in this case might or might not have involved based upon your knowledge of how the system works?

JUROR STRACK: Yeah, okay.

THE COURT: I mean, it sounds to me you're making some assumptions of what has preceded this day in the life of this prosecution and in the life of this criminal investigation. What you need to do is put those assumptions to the side, whatever they are based on, and commit yourself to applying the presumption of innocence which is a legal presumption, and it's an abstraction to a certain extent, but it is a legal presumption you are required to apply as well as to hold the state to its burden of proof factually and apply that burden of proof beyond a reasonable doubt to the state when you evaluate the evidence at the end of the case. Do you think you can do that?

JUROR STRACK: (Nods head.)

THE COURT: That's a yes?

JUROR STRACK: Yes.

THE COURT: Thank you.

….

[CO-DEFENDANT'S COUNSEL]: And Mr. Strack, back to you. I don't want to pick on you because we have gone through quite a bit of questioning already. I

> just want to make sure that everybody understands, that the law is gonna -- the judge is gonna instruct you on the law and gonna instruct you to essentially say that neither defendant has any burden to prove anything, to put any case on whatsoever, so that the defendants never have to testify. They never have to call a witness. Nobody has to ask any questions really, and you said at one point during the questioning that the defense would have to put something up pretty good to convince you that they didn't do this, didn't do what they are charged with. Do you understand that that's what the judge is going to instruct you on; do you understand that?
>
> JUROR STRACK: Yeah, I understand your words. They have witnesses, correct?
>
> [CO-DEFENDANT'S COUNSEL]: Well --
>
> JUROR STRACK: And they will be on the stand, correct?
>
> [CO-DEFENDANT'S COUNSEL]: That remains to be seen, but what you have to understand is neither defendant has the obligation to call a witness or present any evidence.
>
> JUROR STRACK: Okay. I understand that. They can say something in rebuttal. True or false?
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> [CO-DEFENDANT'S COUNSEL]: Well, they can if they want to, but what I'm asking you to at least agree with me on, do you understand that the judge is going to instruct you that that's the law?
>
> JUROR STRACK: Yeah.
>
> [CO-DEFENDANT'S COUNSEL]: Okay. Can you live with that?
>
> JUROR STRACK: Sure.
>
> [CO-DEFENDANT'S COUNSEL]: You can, okay.

¶11 When a trial court engages in the exercise of "striking for cause" an individual prospective juror for lack of impartiality, a question of historical fact arises. The question for the trial court to determine is did the juror swear that he or she could set aside any opinion he or she might hold or entertain and decide the case on the evidence and the instructions given by the court. *See* ***Patton v. Yount***, 467 U.S. 1025, 1036 (1984). This fact determination is essentially one of

credibility, sometimes highly influenced by demeanor. As observed by the ***Patton*** court:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed …. Prospective jurors represent a cross-section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this. The trial judge properly may choose to believe those statements that were the most fully articulated or that appear to have been least influenced by leading.

Id. at 1039.

¶12 Juror Strack's responses to Love's trial counsel's statements and inquiries cast initial doubt about his impartiality. The trial court quite obviously witnessed the exchange between defense counsel and the prospective juror. Love's counsel requested that Strack be struck for cause. The trial court put off a decision on the request and, as set forth above, advised Strack about his responsibilities as a juror. The court, in effect, asked for a commitment from Strack that he would apply the presumption of innocence and make the State meet its burden of proof. Strack's response was "Yeah, okay." Continuing, the court then asked Strack if he could put aside any preconceived assumptions when examining the evidence and still hold the State to its burden of proof. First he nodded and then responded, "Yes."

¶13 Later, when advised by Johnson's trial counsel that neither defendant had any burden to prove anything or to testify, Strack was asked if he understood that the court would instruct him "that that's the law" and if he could

live with that. He replied, "Sure." Subsequent to this exchange, the trial court denied Love's request to strike Strack for cause.

¶14 When reviewing a trial court's action, if the trial court fails to make a factual finding that appears from the record to exist, we may assume facts to support the decision and any conflicts or conflicting inferences will be resolved in favor of the trial court's ultimate conclusion. *See* ***State v. Angiolo***, 186 Wis.2d 488, 495, 520 N.W.2d 923, 927 (Ct. App. 1994).

¶15 From a raw reading of the voir dire transcript, Strack's responses could be assigned either a "Yes" or a "No" answer to whether he was a "reasonable person who is sincerely willing to put aside an opinion or prior knowledge." The trial court had to decide to which responses of the prospective juror it would give more weight based on what it heard and observed. Just as a jury is at liberty to make findings of credibility without explication, so may a judge sitting as a finder of fact. *See* ***United State v. Harris***, 507 F.2d 197, 198 (3d Cir. 1975). We cannot replicate the occasion and, hence, we must recognize the special deference accorded the discretionary determinations of the trial court when finding facts relating to striking a juror for cause. Without explication by the trial court, we can draw no other inference but that "demeanor" was the determining factor in the court's refusal to strike Strack for cause. From the record, we cannot conclude that the trial court's inferred findings are clearly erroneous or that the trial court erroneously exercised its discretion.

¶16 The question remains then whether a reasonable person in Strack's position could set aside any expressed "opinion or prior knowledge." The mere expression of tentative opinions or impressions acquired from other sources is not necessarily a disqualifying factor. The mere existence of a preconceived notion as

to the guilt or innocence of an accused, without more, is insufficient to rebut the presumption of a prospective juror's impartiality. To hold otherwise would be to establish an impossible standard. It is sufficient if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court. *See* ***Irvin v. Dowd***, 366 U.S. 717, 722-23 (1961).

¶17 Every prospective juror comes to jury service with the experiences of their everyday life. From these experiences, judgments and impressions are formed. Jurors' impressions about the administration of justice can be varied. Only when a juror's opinions are so deeply rooted, as evidenced by responses during voir dire, that no amount of reasonable admonition will properly level the playing field will we conclude that no reasonable person can put aside the predilection or bias.

¶18 The record here does not present that point of no return. The trial court was cautious and deliberate in exploring Strack's opinions and impressions. After explaining a juror's obligation, the court asked for a commitment from Strack. It received such twice, however in-artfully expressed. In the context of this case, we conclude that a reasonable person could put aside the commonplace types of opinions and impressions expressed by Strack. The two-part ***Ferron*** test has been met.

B. Insufficient Evidence.

¶19 Love next contends that the evidence was insufficient to establish he was guilty of receiving stolen property. In reviewing a challenge to the sufficiency of the evidence, we:

> may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state

> and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

See ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the conviction.

¶20 To convict Love of receiving stolen property the State had to prove that: (1) he, or a person with whom he was a party to the crime, intentionally received the GMC van or acquired control of it; (2) the GMC van was stolen property at the time it was received; and (3) when the GMC van was received, he knew it was stolen.

¶21 The record reveals the following. On May 20, 1996, the victim, McDowell, was sitting in his GMC van parked at a gas station located at 1432 West Locust Street in the City of Milwaukee. Co-defendant Johnson and an unidentified person approached the van. Johnson pointed a handgun at McDowell and ordered him out of the van. Johnson yanked a gold chain from around McDowell's neck. Johnson and his companion then drove off in the van going north toward Burleigh Street. An attendant at the gas station who witnessed the incident called 911.

¶22 At approximately 1:23 a.m., shortly after the reported robbery, a police officer on patrol in the area, observed the stolen van behind a green Chevrolet Suburban. His attention was drawn to the two vehicles because of their proximity to each other and their high rate of speed. He attempted to follow them

but, because of the route they traveled, he lost sight of them when they turned west onto Keefe Avenue.

¶23 Bruce Smith lived in the 4300 block of North 15th Street, about a four or five minute drive from the site of the robbery. He heard the slamming of car doors in the alley behind his home. He observed two or three men moving things from a van to a Suburban. Because he believed the men were stripping the van, he called 911. When the police responded, they observed the van and the Suburban parked next to each other. They observed three men. When the men saw the officers, they fled on foot. The three were co-defendant Johnson, Love, and Nathaniel Beardon. All three were apprehended after a short pursuit.

¶24 Police brought the three back to the alley where the two vehicles were located. Police also had conveyed McDowell to the alley. McDowell identified Johnson as the person who had pointed the gun at him and taken his van. He could not identify the second man who was originally with Johnson.

¶25 When the police searched Love, they found an auto alarm pager in his pocket which had been taken from the van. When police searched the Suburban, which belonged to Love, they found a stereo taken from the van, and the gold chain which had been yanked from McDowell's neck. Lastly, the police recovered a leopard-print facemask from the Suburban. The gas station attendant who witnessed the robbery had reported that one of the assailants wore a leopard-print bandanna.

¶26 From this summary, it is evident that Love and his co-defendant had acquired control or received the van either at the gas station or in the alley where they began to strip the van of either equipment or personal property belonging to McDowell. There is no doubt that McDowell's van was stolen. From Love and

Johnson's driving pattern and subsequent actions, a reasonable inference can be drawn that they knew the van was stolen. The record is sufficient to support a conviction for receiving stolen property.

C. Sentencing.

¶27 Finally, Love claims that the trial court erroneously exercised its sentencing discretion when it focused exclusively on the uncharged crime of armed robbery without giving any consideration to the charged crime of receiving stolen property. The court sentenced Love to seven years for receiving stolen property; whereas, it sentenced Johnson to twenty-five years for armed robbery, as a repeater.

¶28 A trial court, when imposing a sentence for one crime, may consider other uncharged and unproven offenses, since the other offenses are evidence of a pattern of behavior, which is an index of the defendant's character--a critical factor in sentencing. *See* ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 562 (1980).

¶29 In its sentencing remarks, the trial court opined it was not restricted in its sentencing evaluation to just the particular facts and circumstances that supported the conviction, but rather, could take into account the total circumstances giving rise to the car-jacking and the receipt of stolen property. In sentencing each defendant, the trial court did differentiate between the nature of each conviction, but certainly acted within the proper parameters of its sentencing discretion. The court did not err and we sustain its sentence.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.