COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-2507-CR
99-2508-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONAVAN D. THENO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Donavan D. Theno appeals from a judgment of conviction of substantial battery, six counts of felony bail jumping, and two counts of disorderly conduct. He also appeals from an order denying his motion for

postconviction relief on the grounds that trial counsel was ineffective for not moving to have a juror struck for cause. In addition to his claim of ineffective trial counsel, Theno argues that other acts evidence was improperly admitted at trial, that the trial court erroneously exercised its discretion in excluding the results of preliminary breath tests, and that a new trial should be granted because an adjournment was denied to permit rebuttal evidence. We affirm the judgment and the order.

¶2 The substantial battery and one disorderly conduct charge arose out of an incident that occurred on March 18, 1998, at the residence Theno shared with the battery victim, Shelly Brudnicki. The bail jumping charges resulted from Theno having contact and continuing to live with Brudnicki. The second disorderly conduct charge and an additional bail jumping charge arose out of Theno's conduct on April 12, 1998, when he possessed a knife and tried to persuade Brudnicki to participate in a double suicide. Theno was also charged with bail jumping as a result of his arrest on April 17, 1998, for operating a motor vehicle while intoxicated.[1]

¶3 Prompted by hearing that alcohol was involved, a potential female juror revealed that her husband, a recovering alcoholic, had experience with driving while under the influence. She indicated that she had lived with her husband's alcoholism throughout their twenty-five year marriage. Her concern was that she might be "a little prejudiced" against alcohol. When the trial court asked the juror if she could make a decision based only upon the evidence, she replied, "I think so." Theno contends that his trial counsel should have requested

[1] In a separate case, Theno entered a guilty plea to operating while intoxicated. That conviction is not part of this appeal.

that this prospective juror be removed for cause from the jury panel and that counsel was ineffective for not having done so.[2] *See* ***State v. Traylor***, 170 Wis. 2d 393, 399, 489 N.W.2d 626 (Ct. App. 1992) (failure to conclusively determine whether the juror would follow instructions and set aside potential bias was deficient performance).

¶4 A claim of ineffective assistance of counsel requires Theno to show both deficient performance of counsel and prejudice to his defense. *See* ***id.*** at 397. When reviewing a claim of ineffective assistance of counsel, we may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). As to prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 129 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo without deference to the trial court's conclusion. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶5 A motion to remove the juror for cause would have had merit only if subjective or objective bias existed.[3] "A prospective juror is subjectively biased if

[2] Not having been peremptorily struck, the juror participated in Theno's jury.

[3] In ***State v. James H. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238, *review denied*, 233 Wis. 2d 84, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (Nos. 97-1219-CR, 97-1899-CR), this court had an opportunity to integrate four recent supreme court decisions discussing all aspects of juror bias and adopting the terms "statutory," "subjective" and "objective" bias. This is not a case where statutory bias is a concern.

the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." ***State v. Theodore Oswald***, 2000 WI App 2, ¶19, 232 Wis. 2d 62, 606 N.W.2d 207, *review denied*, 233 Wis. 2d 84, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (No. 97-1026-CR). Objective bias exists when the prospective juror's relationship to the case is such that no reasonable person in the same position could possibly be impartial even though the juror desires to set aside any bias. *See* ***State v. James H. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238, *review denied*, 233 Wis. 2d 84, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (Nos. 97-1219-CR, 97-1899-CR).

¶6 Although trial counsel did not make a motion to strike the prospective juror for cause, the trial court considered whether the juror should be dismissed from service.[4] Implicit in the trial court's ruling that it would not excuse the juror is a finding that neither objective nor subjective bias existed.

¶7 With respect to subjective bias, whether a prospective juror has exhibited a sincere willingness to set aside bias is largely left to the trial court's discretion. *See* ***id.*** at ¶6. Because a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality, our review of the trial court's determination of subjective bias does not "focus on the particular isolated words the juror used. Rather, we look at the record as a whole, using a very deferential lens, to determine if it supports the [trial] court's conclusion." ***Id.*** Here, the trial court explained to the prospective juror that the case was not about

[4] In chambers the trial court questioned several jurors about matters too personal to discuss in open court. The court had already, on its own motion, dismissed a prospective juror for cause after the juror expressed prejudice due to experiences with alcoholism and domestic violence.

whether domestic violence or driving while under the influence was acceptable behavior but only if the incidents occurred. The trial court accepted the juror's response that she thought she could decide the case only on the evidence as credible. Given the trial court's superior advantage in assessing the juror's manner and body language, *see* ***id.***, we cannot conclude that the trial court's implicit finding is clearly erroneous, *see* ***State v. Erickson***, 227 Wis. 2d 758, 775, 596 N.W.2d 749 (1999), *cert. denied*, 120 S. Ct. 987 (2000).

¶8 "[T]he trial court's determination of objective bias will be reversed only if, as a matter of law, a reasonable judge could not have reached the same conclusion." ***James H. Oswald***, 2000 WI App 3 at ¶5. Objective bias can be found when there is evidence that a juror has such ingrained attitudes about the subject of the case that a reasonable person could not set those attitudes aside and decide the case fairly. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 850 n.6, 596 N.W.2d 736 (1999). The deference afforded the trial court's determination of objective bias is slightly less than that applicable to a determination of subjective bias because the conclusion of whether the facts add up to objective bias is intertwined with the factual findings. *See* ***James H. Oswald***, 2000 WI App 3 at ¶5.

¶9 The juror's mere status as a wife of an alcoholic did not give rise to objective bias. ***Erickson*** teaches that certain groups of persons are not to be categorically excluded from serving on a jury. *See* ***Erickson***, 227 Wis. 2d at 777. The juror confirmed that none of her experiences involved domestic violence as a result of alcohol use. Moreover, while Brudnicki testified that she believed Theno had consumed alcohol before the assault, the critical issue was not whether the consumption of alcohol had prompted the assault. The prospective juror's status as the wife of a recovering alcoholic did not have direct bearing on her ability to

determine if the alleged events actually occurred. There was no direct connection between the juror's past experiences and the dispositive issues at trial.

¶10 We conclude that there was no reason to strike the prospective juror for cause. Theno was not prejudiced by trial counsel's failure to make a motion that lacked merit. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Theno was not denied the effective assistance of counsel.

¶11 We turn to Theno's claim that other acts evidence was improperly admitted. We consider whether the circuit court properly exercised its discretion in admitting the evidence. *See* ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918 (1999). The three-step analytical framework used to determine whether other acts evidence was properly admitted is: (1) "Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2) (1997-98),[5] such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?"; (2) "Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01?"; (3) "Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?" ***Gray***, 225 Wis. 2d at 49-50. The relevancy determination requires an assessment of probative value. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998). Thus, "[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Id.*** at 787.

[5] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶12 During Brudnicki's testimony, the State asked her about a restraining order she obtained against Theno in September 1996. Brudnicki downplayed the significance of the restraining order and explained that she had only gotten it because she was mad at Theno after an argument. The prosecutor indicated that Brudnicki had alleged in her petition for the restraining order that Theno had strangled her in front of the baby, that he took an axe to the stove and kitchen table, that he beat the dog, and that he told the baby to shut up before he shuts her up. Brudnicki replied, "[I]t's more or less false." She denied that Theno had strangled her. She said she had only made that allegation because "you can't get a restraining order against someone unless something physically happens to you." A copy of the petition for a restraining order and the restraining order were admitted into evidence.

¶13 The evidence was admitted as relevant to Theno's intent and the absence of mistake in causing her physical harm. However, in the absence of actual evidence that Theno strangled Brudnicki during the 1996 altercation, a similarity of conduct does not exist and the 1996 restraining order lacked probative value on intent. The admitted acts of violence Theno committed against property in 1996 are of a different character than the acts of violence against Brudnicki herself in the present case. We conclude that it was an erroneous exercise of discretion to admit evidence of the 1996 restraining order.

¶14 We must next consider the harmless error test: "whether there is a reasonable possibility that the error contributed to the conviction." ***Sullivan***, 217 Wis. 2d at 792. "The conviction must be reversed unless the court is certain the error did not influence the jury." ***Id.*** Even in light of Theno's denial of any intent to cause Brudnicki bodily harm and Brudnicki's initial trial testimony attempting to characterize Theno's conduct as accidental, there was sufficient evidence from

which the jury could find the requisite intent. Brudnicki testified that Theno flung her with sufficient force that she was propelled across the room into a dresser. She was confronted with the statement she gave on the night of the assault that Theno had pushed her full force on the chest into the dresser. Her rebuttal testimony reiterated that Theno had come at her full force and pushed her. A diagnostic radiologist indicated that the fractures Brudnicki suffered to three vertebrae were consistent with being pushed into a dresser. We are convinced that evidence of the 1996 restraining order did not contribute to the conviction and conclude that admission of that evidence was harmless error.

¶15 Theno also contends that a hospital security officer's testimony that Theno was subjected to a forced blood draw because it was Theno's fourth offense of operating while intoxicated was improper other acts evidence. During trial, Theno moved for a mistrial after the testimony was given. He argued that the jury was improperly informed that he was facing a fourth offense operating while intoxicated after the parties agreed that the jury was not to hear that it was a fourth offense. To avoid a mistrial ruling, the State withdrew the security officer as a witness and an admonitory instruction was given to the jury. Theno did not interpose an objection in light of this solution.

¶16 We observe that in response to Theno's objection the trial court crafted a remedy. We decline to review the issue on appeal in light of Theno's failure to object to the remedy. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). If we were to address the issue, we would do so not under an other acts analysis but on the trial court's exercise of discretion in addressing Theno's motion for a mistrial. The appropriate determination is whether in light of the whole proceeding the claimed error was sufficiently prejudicial to warrant a new trial. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506-07,

529 N.W.2d 923 (Ct. App. 1995). The security officer's testimony was but a single observation in a four-day trial. The information about a fourth offense was not repeated to the jury. Indeed, even the trial court's admonition to the jury to disregard the officer's testimony did not draw attention to offending testimony. Since juries are presumed to follow properly given admonitory instructions, *see* ***State v. Leach***, 124 Wis. 2d 648, 673, 370 N.W.2d 240 (1985), the trial court did not erroneously exercise its discretion in denying a mistrial.

¶17 Theno wanted to put on evidence that on the night of the assault two preliminary breath tests (PBT) were taken and indicated that he had not been drinking alcohol.[6] We do not address the grounds for the trial court's ruling excluding this evidence because Theno's offer of proof was insufficient to preserve the claim of error. We will not consider whether evidentiary error occurred absent a proper offer of proof. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996); WIS. STAT. § 901.03(1)(b). "An offer of proof need not be syllogistically perfect but it ought to enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption." ***Milenkovic v. State***, 86 Wis. 2d 272, 284, 272 N.W.2d 320 (Ct. App. 1978). The offer of proof must be adequate to establish the relevance of the information. *See* ***id.*** at 284-85.

¶18 The offer of proof here consisted only of trial counsel's assertion that police officers administered two PBT tests and "they came out to be zero." Counsel also asserted that another PBT test was administered at the station. This is insufficient proof that the tests were actually administered and, depending on when

[6] The evidence was intended to contradict Brudnicki's testimony that Theno had been drinking on the night of the assault.

they were administered, that the results would accurately reflect Theno's level of intoxication at the time of the assault or seriously challenge Brudnicki's testimony.[7] Evidence which is inaccurate or unreliable is not admissible in any event. *See* ***State v. Beaver***, 181 Wis. 2d 959, 970, 512 N.W.2d 254 (Ct. App. 1994). In the absence of an adequate factual basis for admission of the evidence, we affirm the trial court's ruling.

¶19 After the jury's verdict, Theno moved for a mistrial based on allegations that Brudnicki violated the sequestration order[8] and because the jury was not permitted to hear his mother's testimony impeaching Brudnicki's version of a recent phone call with Theno. In her rebuttal testimony Brudnicki essentially recanted her prior version of the assault as accidental and indicated that Theno had come at her full force. She also mentioned a two-hour phone conversation which she had with Theno the night before in which he yelled at her about her testimony. Theno claims that he was denied a requested adjournment so he could present testimony from his mother with respect to the tenor of the two-hour phone conversation.[9] At the postverdict motion hearing, Theno's mother testified that Brudnicki had initiated the phone call and that she did not believe Theno was upset during the call. Theno argues that a new trial in the interests of justice is

[7] The State indicated at sentencing that there is some discrepancy about whether a PBT test was administered that night. The State acknowledged that it may have been the jail's standard to check a PBT before incarcerating a person for the night.

[8] Specifically, Theno alleged that Brudnicki violated the sequestration order by having contacted Theno, her mother and her sister during trial about their testimony and by deliberately positioning herself outside the courtroom so she could overhear cross-examination.

[9] Prior to Brudnicki's rebuttal testimony, trial counsel suggested that if she testified about the phone conversation he would have to seek an adjournment to present impeaching evidence. The trial court asked counsel to wait to see what the rebuttal testimony was about. Theno did not renew his request for an adjournment after Brudnicki's rebuttal testimony. Therefore, we are not asked to directly address the trial court's failure to grant an adjournment.

appropriate because the jury did not hear his mother's testimony which would have further undermined Brudnicki's credibility.[10]

¶20 We may exercise our discretionary power to grant a new trial where the real controversy has not been fully tried or there was a probable miscarriage of justice. *See* ***State v. Ray***, 166 Wis. 2d 855, 875, 481 N.W.2d 288 (Ct. App. 1992). A claim that the jury was not given an opportunity to hear important testimony bearing on an important issue in the case falls into the category of the real controversy not being fully tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). We need not find a probability of a different result on retrial to order a new trial on the ground that the real controversy was not fully tried. *See* ***id.*** at 160. Only the most exceptional cases justify granting a new trial in the interests of justice. *See* ***id.*** at 161.

¶21 We are not persuaded that the real controversy was not fully tried. Brudnicki's testimony about the phone conversation was not direct evidence of the crime. Moreover, Brudnicki's credibility had been fully tested, not only by her own admission that she lies out of anger at Theno, but by her different descriptions of the assault. What Theno cannot escape is that Brudnicki's testimony about the assault was corroborated by contemporaneous complaints to relatives, friends and medical personnel. Impeaching her testimony about the phone call was of little probative value.

[10] Theno does not argue with specificity that Brudnicki's violation of the sequestration order demands a new trial in the interests of justice. We need not consider arguments broadly stated but not specifically argued. *See* ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988). We observe that nothing in the record suggests that any witness shaped his or her testimony as a consequence of the violation of the sequestration order such that the trial court should have exercised its discretionary authority to impose a mistrial sanction. *See* ***Nyberg v. State***, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977); ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983).

By the Court.—Judgment and order affirmed.

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