COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0170-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM MCCALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. William McCall appeals a judgment convicting him of possessing cocaine with intent to deliver it. The issue is whether the trial court erred by denying his request to strike three jurors for cause. We affirm.

¶2 The State charged McCall after a City of Milwaukee police officer observed him taking part in an apparent drug transaction. Both sides went to trial understanding that the outcome largely depended on the jury's assessment of the officer's credibility.

¶3 During voir dire, juror Joan Simon identified herself as the wife of a Milwaukee County deputy sheriff. When asked if she might give a law enforcement officer's testimony greater weight because of her husband's occupation, she replied, "To be honest, I might." Simon went on to state that her husband had occasionally participated in drug-related enforcement activities in the past, and that fact also might influence her. She made other statements indicating that she understood a juror's duty.

¶4 Juror Alicia Herrera identified herself as a Milwaukee public school teacher who team-taught with sheriff's department officers in a school drug control program. She also had a cousin who was a detective in the Milwaukee Police Department. Herrera agreed that she might give an officer's testimony greater weight because of her work and family connections. She answered "possibly," to the question whether she could judge a drug case fairly.

¶5 Juror Denise Davis identified herself as a school psychologist who worked in drug prevention programs. She stated that it would be difficult to put aside her background in judging this case. She also stated that she believed the defense would have to put on a case. She acknowledged, however, that the State had the burden of proving guilt beyond a reasonable doubt, and that she would not require McCall to testify in order to fairly judge his guilt.

¶6 The trial court subsequently made the following statement:

> The issue is not whether drugs are good or bad. The issue is whether the case has been proven, so that's what your duty would be as a juror, to look at the case, look at the law and the facts and determine did they show you enough to prove this case beyond a reasonable doubt.
>
> Does anybody have any difficulty with having that be your duty as a juror?

No juror responded affirmatively to that question. In response to McCall's motion to strike Simon, Herrera and Davis for cause, the trial court stated:

> [T]he Court ruled against your motion for striking them for cause based on the fact that both in your questioning and in further questioning by the Court they did admit their relationships could cause them some problems, but they affirmed that they would be willing to review the case fairly and objectively and to hold the State firmly to its burden, and they also indicated that they would not convict on anything less than the burden being met, and they could follow their duty and their oath as jurors, so based on that—those representations, I felt that it was not sufficient for cause.

¶7 McCall used three of her peremptory strikes to remove Simon, Herrera and Davis from the jury panel. As expected, the trial was essentially a credibility contest between the testifying officer and McCall, whose version was supported by another participant in the alleged transaction. The jury found McCall guilty.

¶8 WISCONSIN STAT. § 805.08(1) (1999-2000)[1] provides that a juror who shows bias or prejudice must be excused. A bias may be one expressly

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

identified in § 805.08 (related by blood or marriage to a participant in the trial or have a financial interest in the case), or it may be some other bias, either subjective or objective. *See* ***State v. Faucher***, 227 Wis. 2d 700, 716 ¶25, 596 N.W.2d 770 (1999). Subjective bias is that which is revealed through the words and the demeanor of the prospective juror. ***Id.*** at 717 ¶27. We uphold a trial court's determination regarding subjective bias unless it is an erroneous exercise of discretion. *See* ***State v. Erickson***, 227 Wis. 2d 758, 775 ¶39, 596 N.W.2d 749 (1999), *cert. denied*, 528 U.S. 1140 (U.S. Wis. Jan. 24, 2000) (No. 99-6572). Objective bias exists when a reasonable person in the individual prospective juror's position could not be impartial. ***Faucher***, 227 Wis. 2d at 718 ¶29. Whether the trial court's findings establish objective bias is a question of law, although a reviewing court gives weight to the trial court's conclusion because the facts and law are intertwined. ***Id.*** at 719-20 ¶31. The erroneous refusal to strike a juror for cause is not subject to harmless error analysis. ***State v. Ramos***, 211 Wis. 2d 12, 24-25 ¶27, 564 N.W.2d 328 (1997).

¶9 In this case, McCall asserts that Simon, Herrera and Davis were both subjectively biased, as shown by their responses on voir dire, and objectively biased due to their connection with drug treatment programs and law enforcement officers. The trial court's ruling preceded the ***Faucher*** subjective/objective analysis, and therefore the court did not employ those terms. However, the refusal to strike the jurors on either ground is implicit in the court's ruling.

¶10 The trial court did not err in determining that there was no disqualifying subjective bias on the part of the three prospective jurors. Each made statements during voir dire that called into question her ability to fairly judge the case. However, each also indicated that she could put aside her concerns and fairly and objectively hear the matter. "[A] prospective juror need not respond

to voir dire questions with unequivocal declarations of impartiality. Indeed, we expect a circuit court to use voir dire to explore a prospective juror's fears, biases, and predilections and fully expect a juror's honest answers at times to be less than unequivocal." ***Erickson***, 227 Wis. 2d at 776 ¶42 (citation omitted). In assessing the potential bias of an equivocal prospective juror, the trial court's presence during voir dire places it in a far superior position to this court in resolving the matter. ***Id.*** at 776-77 ¶¶43-44. We conclude that the trial court reasonably resolved the subjective bias issue by considering the jurors' responses to all questions put to them, and therefore acted within its discretion.

¶11 We also conclude that the background and experiences of the three prospective jurors did not show them to be objectively biased. Relatives or co-workers of law enforcement officers are not deemed objectively biased merely by that connection. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 851 ¶25, 596 N.W.2d 736 (1999); ***State v. Oswald***, 2000 WI App 3, ¶¶21-22, 232 Wis. 2d 103, 606 N.W.2d 238, *review denied*, 2000 WI 21, 233 Wis. 2d 84, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (Nos. 97-1219-CR & 97-1899-CR), *cert. denied*, __ U.S. __, 120 S. Ct. 2757 (U.S. Wis. Jun. 29, 2000) (No. 99-9696). Nor is the fact that two of the jurors worked in drug prevention programs determinative. While both unquestionably strongly opposed drug dealing, so too does a vast majority of the public. We cannot infer that a reasonable person involved in anti-drug abuse activities holds such strong feelings, beyond the norm, that he or she could never fairly judge an individual facing drug charges. Our conclusion is consistent with decisions from the Wisconsin Supreme Court and the United States Supreme Court that strongly disfavor excluding entire categories of persons from serving as jurors. *See* ***Mendoza***, 227 Wis. 2d at 851-53 ¶¶24-28.

By the Court.—Judgment affirmed.

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