COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2647-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH J. TRAEDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] A jury convicted Kenneth Traeder of operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 1999-2000 version.

§ 346.63(1)(a).[2] The sole issue is whether the trial court erroneously exercised its discretion during voir dire of the prospective jurors[3] by refusing to allow Traeder to ask questions of individual jurors unless it was to follow up on a general question. This court is satisfied that the trial court properly exercised its discretion. The judgment of conviction is therefore affirmed.

BACKGROUND

¶2 At the beginning of voir dire, the trial court advised the jurors that they should raise their hands if their answer was "yes" to any of the questions. The court conducted a fairly lengthy[4] and thorough voir dire and then permitted the parties to address questions to the jurors. Traeder's attorney, Dennis Melowski, first asked if there was anyone who believed he or she did not understand the term "burden of proof." No one raised their hand. Melowski then asked one of the jurors what he thought the term meant. The prosecutor objected, and the trial court sustained the objection. The court then convened a sidebar conference to discuss the objection.

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[2] WISCONSIN STAT. § 346.63(1)(a) provides in part:

> No person may drive or operate a motor vehicle while:
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or a combination of an intoxicant, a controlled substance, and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving ….

[3] For economy, the terms "juror" and "panel" are used in this decision to describe the potential jurors subject to voir dire.

[4] The trial court's voir dire covers 22 transcript pages.

¶3 After the sidebar conference and having received no show of hands regarding the burden of proof question, Melowski resumed voir dire by confirming that everyone on the panel understood the concept of "burden of proof." One of the jurors shook his head in a negative response, and Melowski then followed up with a lengthy explanation of the State's responsibility to prove guilt beyond a reasonable doubt. Melowski then ascertained the juror's understanding and followed with another general question inquiring whether anyone else had any misunderstanding or needed clarification of the concept. He received no response. Thereafter, Melowski asked five more questions, receiving no responses.

¶4 After voir dire, the trial court placed its sidebar ruling on the record. It held that when the jury was asked a general question and no one responded by raising his or her hand, counsel would not be permitted to address a form of the same question to individual jurors.[5] The court recognized that the control of voir dire is within its sound discretion. It gave several reasons why it would not permit the type of voir dire Melowski attempted,

> not the least of which is that serving on a jury is an unusual and stressful experience for jurors. They are in a strange environment and [it is] a strange experience for them, and to ask them, without any background, in terms of some general statement of some important and complex issue like what the burden of proof means, to simply articulate what their understanding of it is, I think puts a juror in an unreasonable and unfair position. …
>
> [W]hile it's important that jurors are able to understand these legal concepts and to appreciate them, it's quite a different thing to simply be asked to explain them, where they don't come prepared to do so, they're not expecting to have to do so. And so, really, from the point of view of the

[5] The trial court made its ruling at a side bar conference, which Traeder's attorney later memorialized on the record at the court's request.

> jurors, what is reasonable to expect of them, I wouldn't have permitted that.

¶5 The trial court further determined that placing a juror in the position it had described would embarrass and or intimidate the juror and, additionally, as a result was potentially "inhibiting."[6] Moreover,

> if that kind of unprovoked … question is able to be directed at any one juror, either the Court would have to permit similar kinds of questions to be asked of all jurors, or there's the potential that the perception would be for jurors, "Why is that person singled out?" "Why me?" "Why am I, not someone else?" when there's been no affirmative response on their part to have provoked that. And, again, from the perspective of the jurors, I think [it] introduces some wild cards.

¶6 In addition, the trial court was concerned that "there was no logical end" to the approach Melowski proposed, and therefore voir dire "could go on forever." The court expressed its view that it had a responsibility to set reasonable limits upon "the extent and breadth of the voir dire …." It noted that it "did not in any way inhibit inquiry on voir dire about the importance or the nature of the burden of proof …." The court observed that earlier in the voir dire, "rather extensive" prefacing remarks had sufficiently introduced the concept to the jury so that it would follow the law. Finally, the court indicated its satisfaction that voir dire method the court required in no way "inhibited the impaneling of a fair and impartial jury."

[6] Because Traeder was attempting to ask jurors unsolicited questions, this court assumes the trial court was concerned that the embarrassed, intimidated juror would be inhibited in giving a meaningful or thoughtful response to Traeder's voir dire question.

DISCUSSION

¶7 The Sixth Amendment to the United States Constitution and § 7, art. I, of the Wisconsin Constitution guarantee a defendant an impartial jury. ***Hammill v. State***, 89 Wis. 2d 404, 407, 278 N.W.2d 821 (1979). Further, principles of due process guarantee a defendant a fair trial by a panel of impartial jurors. ***Id.*** Within this framework, control of the voir dire rests primarily with the trial court. ***Id.*** at 408. Voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." ***Id.*** (citation omitted.) The trial court's discretion over how a voir dire is conducted is "broad," ***id.***, and, accordingly, this court will not disturb the court's voir dire decisions without a showing that the court misused its discretion. ***State v. Oswald***, 2000 WI App 2, ¶44, 232 Wis. 2d 62, 606 N.W.2d 207. Appellate review of discretionary rulings is highly deferential: This court does no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Salentine***, 206 Wis. 2d 419, 429-30, 557 N.W.2d 439 (Ct. App. 1996). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991).

¶8 Despite the applicable standard of review, Traeder does not specifically address the manner in which the trial court exercised its discretion. Nor does he point to any authority suggesting that he has an absolute right to ask individual jurors unsolicited questions. Rather, Traeder observes that our supreme court has recognized the peremptory challenge as one of an accused's most important rights. *See* ***State v. Gesch***, 167 Wis. 2d 660, 671, 482 N.W.2d 99 (1992). He also cites to cases that discuss an accused's need to be able to freely exercise peremptory challenges and the appropriate remedy when a court

interferes with the effective exercise of such challenges. Traeder then argues that a trial court's discretion concerning voir dire is limited not only by "the essential demands of fairness,"[7] but is further restricted under ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), so as to ensure an accused's right to the full exercise of his or her peremptory challenges.

¶9 Traeder further points to the juror's response to the follow-up question after the panel's failure to reply to the initial burden of proof question: "Clearly, this potential juror did not understand the term 'burden of proof.' However, the initial, general question did not reveal the problem. Notably, the jury did not respond to another question asked by defense counsel."

¶10 The cited legal propositions, together with the response to the follow-up question regarding the burden of proof, lead Traeder to his single contention in this case: The trial court's restriction on asking unsolicited questions of the jurors "prevented him from gathering sufficient information to fully and effectively exercise his peremptory challenges." This court is unpersuaded.

¶11 Traeder does not demonstrate that his right to fully and effectively exercise peremptory challenges was impaired by merely speculating that jurors will not volunteer responses to general voir dire questions when appropriate. More to the point, and as the State notes, the record belies Traeder's premise. Without reciting each one, suffice it to say that the record is replete with instances where the jurors volunteered answers to general questions.[8] Indeed, Traeder

[7] ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979).

[8] In each instance, the attorney was permitted to ask follow-up questions of the responding juror.

(continued)

himself points to the response he received in an attempt to demonstrate that his right to full and effective use of his peremptory challenges was impaired. The example Traeder relies on in fact demonstrates that directing a follow-up question to the jury to confirm its response to a previous general question is an effective method of eliciting responses.[9] Traeder has failed to show that the method for conducting voir dire imposed by the trial court impaired Traeder's right to exercise his peremptory challenges.

¶12 As indicated, Traeder does not attempt to argue that the trial court exercised its discretion based upon inappropriate considerations. In any event, this court is satisfied that the reasons articulated by the court, including juror embarrassment and intimidation on their own and as they might affect the juror's ability to give a meaningful answer, and unnecessary waste of time, are proper legal standards and that the court reached a reasonable decision to restrict voir dire to general questions and follow-ups.[10] The judgment of conviction is therefore affirmed.

Melowski's last five inquiries concerned the elements of the offense, witness credibility, presumption of innocence and the ability to remain fair and impartial. These were standard questions, apparently calculated principally to educate the jury rather than to discover peremptory challenge targets. Traeder nevertheless observes that after the response to the follow-up question regarding the burden of proof, the jury did not reply to his five remaining questions. All this proves is that some questions may provoke a response, while others may not.

[9] Moreover, because the person Melowski attempted to question individually was not the same person who responded to the follow-up question after the sidebar conference, he may not necessarily have gained information useful for exercising peremptory challenges unless he repeated each question to each juror. It was the specter of such unnecessary time consumption that in part led the court to its ruling.

[10] Traeder has not pointed to any specific special concerns presented by the facts and circumstances of this case that might outweigh the trial court's concerns of avoiding wasting judicial resources unnecessarily or jury intimidation.

By the Court.—Judgment affirmed.

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