COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2779-CR **Cir. Ct. No. 99-CF-17**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. James Miller appeals a judgment of conviction and an order denying his postconviction motion. The issues are whether certain testimony about Miller's interrogation should have been admitted, and whether he was entitled to a new trial because the jury was exposed to extraneous prejudicial information during deliberations. We affirm.

¶2 Miller was convicted of one count of first-degree reckless injury while using a dangerous weapon and one count of aggravated battery while using a dangerous weapon. The allegation at trial was that Miller had fired a shotgun at Calvin Nakai, a visitor at Miller's residence who had become violent and threatening. Miller's defense was that he fired in defense of self or others under WIS. STAT. § 939.48(1) and (4) (1999-2000).[1]

¶3 At trial, the State presented testimony by a police detective who interrogated Miller. The detective was asked if he and Miller discussed "whether this shooting was justified as self-defense." The detective testified that he told Miller that after viewing the evidence and the distances between Miller and the others, the detective "didn't think anybody is going to believe that this firing was justified in self-defense." Miller's response, according to the detective, was "I can't argue that." During his own testimony, Miller stated that he followed this response by telling the detective that he was not going to argue with him, that this was the detective's opinion, and it would not do Miller any good to argue with him.

¶4 Miller argues that his response "I can't argue that" should not have been admitted because it was inherently ambiguous, and therefore lacked sufficient probative value to meet the test for relevance provided in WIS. STAT. § 904.01. We conclude the evidence was relevant. Although ambiguous out of context, one of its possible meanings in context is that Miller was conceding that he himself had not believed, at the time he fired, that there had been an unlawful

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

interference with his person or the others', or that the amount of force he used was necessary to prevent imminent death or great bodily harm, as required to establish the elements of his defense under WIS. STAT. § 939.48.

¶5 Miller argues that the detective should not have been allowed to testify that he told Miller that nobody was going to believe the shooting was justified. Miller argues that the detective's statement was essentially opinion testimony by the detective that Miller's conduct did not satisfy the legal test for self-defense, and thus was inadmissible opinion evidence on an ultimate issue to be decided by the jury. We conclude that this testimony was properly admitted. As we explain above, Miller's response to the detective's comment was relevant evidence with at least some probative value. The only way for that evidence to be presented accurately and in context was for it to follow the detective's statement that elicited Miller's response. Miller's response, by itself, would mean nothing. Therefore, regardless of whether the detective's statement might ordinarily have been inadmissible for the reasons Miller argues, it was admissible in this case to set the context for Miller's response, and not for its own truth or value as opinion evidence.

¶6 Miller also argues that both the detective's statement and Miller's response should have been excluded under WIS. STAT. § 904.03 because of unfair prejudice, confusion of the issues, and misleading the jury. Again, we think the trial court properly exercised its discretion. The evidence does not cause unfair prejudice, and is not complicated or confusing.

¶7 Miller next argues that the court erred in denying his motion for a new trial on the ground that one of the jurors had introduced extraneous information into deliberations. Miller's motion was supported by an affidavit.

Much of the content of that affidavit concerns the jury's deliberations in this case and is therefore inadmissible under WIS. STAT. § 906.06(2). We will not consider that information in reviewing this issue. We consider only whether extraneous prejudicial information was improperly brought to the jury's attention.

¶8 Miller's motion presented the affidavit of one juror who averred that another juror stated that the judge would make them deliberate until they reached a unanimous decision and would not accept a "mixed verdict." The juror said that the comment was based on prior jury service. The circuit court held that this information was not extraneous, and therefore it denied the motion without an evidentiary hearing.

¶9 We also conclude that the information was not extraneous. Jurors are permitted to rely on their "life experiences" during deliberations. ***State v. Heitkemper***, 196 Wis. 2d 218, 225, 538 N.W.2d 561 (Ct. App. 1995). The juror's statements in this case arose from her "life experience" in prior jury service, rather than from her own research or other source of information outside herself.

¶10 Furthermore, we do not believe the statements were prejudicial. The test for prejudice is not related to whether the deliberation of this particular jury was affected, as Miller argues, but is instead whether there is no reasonable possibility that the error had a prejudicial effect on a hypothetical average jury. *See* ***State v. Poh***, 116 Wis. 2d 510, 525-30, 343 N.W.2d 108 (1984). We are satisfied that there is no possibility that an average jury would be affected by this juror's statement. The potential prejudice lies in her statement that the court would not accept a "mixed verdict," that is, a hung jury, and would require them to continue deliberations indefinitely until a unanimous verdict was reached. We do not believe an average juror would accept this suggestion as literally true.

¶11 Finally, Miller argues that we should reverse under WIS. STAT. § 752.35 because justice has miscarried in this case. His argument is based on the same claims of error that we have rejected above. We conclude that discretionary reversal is not appropriate in this case.

By the Court.—Judgment and order affirmed.

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