COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2320-CR **Cir. Ct. No. 00-CT-1084**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIM A. DASKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Kim A. Dasko appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense, pursuant to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(c). Dasko was found guilty

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

of the charge following a requested jury trial. Dasko's appeal raises two issues: (1) the trial court erred when it denied her motion to strike a prospective juror for cause based on subjective bias; and (2) as a result of this denial, Dasko seeks the remedy of a new trial because she was forced to use one of her four peremptory challenges to remove this juror, thereby depriving her of the full benefit of her peremptory challenges. We conclude that the record reveals that the trial court erred in not removing the juror for cause based on subjective bias; however, Dasko was not deprived of any rights under Wisconsin law and therefore is not entitled to a new trial. We affirm the judgment.

¶2 Dasko objects that juror Klipstein should have been removed for cause during voir dire. The first exchange with Klipstein began when she raised her hand to defense counsel's question asking if anyone would hold consuming alcohol and driving against Dasko. When questioned further by defense counsel on this point, Klipstein revealed that she believed in the philosophy that one should not drink any alcohol and drive. This response prompted defense counsel to ask if Klipstein could sit fairly or not. She answered that she did not know.

¶3 Directly following this exchange, defense counsel then went on to explain the burden of proof and asked if everyone agreed that Dasko should be presumed innocent. At this point, Klipstein asked defense counsel to repeat the question, which he did, and Klipstein agreed that Dasko should be presumed innocent. Defense counsel followed this up with questions about whether Klipstein felt Dasko "did something wrong," and Klipstein responded affirmatively. Defense counsel then asked Klipstein if in her mind Dasko had "some of the burden to prove she is innocent?" Klipstein answered, "Absolutely." When asked if she could set this aside, Klipstein said, "If she can prove it."

¶4 At this time, the court intervened and explained to the jurors the presumption of innocence and the State's burden to prove every element of this case beyond a reasonable doubt. The court then asked if anyone on the panel could not follow this rule; no one raised his or her hand. However, Klipstein immediately asked, "Why would you get a high-priced lawyer to defend you if you didn't do something wrong?" She also added that she did have a problem with this rule. Defense counsel then made the motion to strike Klipstein for cause based on subjective bias.

¶5 The court proceeded to try to rehabilitate Klipstein by stressing what the law is and asked Klipstein if she could set aside the concepts she just related and decide the case based upon the facts and the law so instructed by the court. Klipstein responded, "I think I can." The court then asked, in detail, if Klipstein could fairly decide the case, to which she responded: "I believe I should be able to do that absolutely." The court then denied the defense motion. Defense counsel then asked more questions of Klipstein about Dasko having to prove her innocence, specifically, "In your mind, would she have to do anything to prove her innocence?" Klipstein responded, "Yes, I guess you would have to, because otherwise we wouldn't be here."

¶6 The United States and Wisconsin Constitutions guarantee a defendant the right to a fair trial by an impartial jury. U.S. CONST. amend VI; WIS. CONST. art. I, §7. A juror should be removed for cause if the juror has expressed or formed any opinion, or is aware of any bias or prejudice in the case. WIS. STAT. § 805.08(1). Furthermore, a juror shall be excused if the juror is not indifferent in the case. ***Id.*** "Even the appearance of bias should be avoided." ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990).

¶7 In ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), the supreme court clarified the terminology to be used when examining juror bias. A prospective juror should be removed for cause if the juror is (1) statutorily biased, (2) subjectively biased, or (3) objectively biased. ***Id.*** at 716. In this case, the issue being raised is subjective bias.

Subjective Bias

¶8 The term "subjective bias" is described as "bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." ***Id.*** at 717. Additionally, a prospective juror is subjectively biased if 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 juror might have. ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). A reviewing court will "uphold the trial court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous." ***Faucher***, 227 Wis. 2d at 718.

¶9 Keeping the above standard in mind, the record reveals that Klipstein was not indifferent towards this case and should have been struck for cause. WIS. STAT. § 805.08(1). Looking at the record as a whole, and examining Klipstein's answers to questions posed by defense counsel and the court, the question arises as to Klipstein's sincere willingness to set aside her biases in this case. The important points are that more than one bias was at work here and that Klipstein repeatedly contradicted her assurances to the court that she could set aside her opinions and sit fairly in this case.

¶10 To begin with, Klipstein stated that she "did not know" if she could sit fairly during this trial based on her belief that one should not drink any alcohol and drive. Klipstein gave conflicting answers to defense counsel's questions, first

by agreeing that Dasko should be presumed innocent, and then stating that she believed that Dasko needed to prove her innocence. At this point, the court stepped in to clarify presumption of innocence and the burden of proof and asked if any of the jurors would have a problem with this rule. Klipstein did not raise her hand, but then shortly after this she did tell the court that she had a problem with the rule. When the court questioned Klipstein, she responded that she believed she would be able to sit fairly in this case. However, following the court's denial of defense counsel's motion to remove for cause, Klipstein's opinions surfaced again in that she felt Dasko needed to do something to prove her innocence. While these statements taken alone may not be sufficient to require removal, taken as a whole they reveal Klipstein's state of mind and that she was either unable or unwilling to set aside her opinions. Therefore, the court should have removed Klipstein for cause based on her inability to be indifferent towards this case.

Remedy

¶11 Dasko argues that because she had to use one of her four peremptory strikes to remove Klipstein, the court should grant her a new trial based on our supreme court's decision in ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), *overruled by* ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. The rule in ***Ramos*** states that "the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right." ***Id.*** at 14.

¶12 However, this harsh remedy was re-examined in ***State v. Lindell***, 2001 WI 108, ¶5, 245 Wis. 2d 689, 629 N.W.2d 223, and as a consequence, the ***Ramos*** decision was overruled. In ***Lindell***, our supreme court returns to the

analyses of juror bias claims under WIS. STAT. § 805.18(2). ***Lindell***, 2001 WI 108 at ¶111. Under § 805.18(2), an appellate court first determines whether the circuit court erred, using the appropriate standard of review for each type of bias claim. ***Lindell***, 2001 WI 108 at ¶111. Then, if the appellate court determines that a circuit court's decision is clearly erroneous (in the case of subjective bias), or an error of law (with respect to other alleged claims), it evaluates whether the error has affected the substantial rights of the party. ***Id.*** This analysis is conducted in fact situations in which a defendant has not claimed a violation of his or her Sixth Amendment right to an impartial jury. ***Id.*** Since we have concluded that the trial court's decision was clearly erroneous, we move to whether the error was harmless or if Dasko's substantial rights were affected.

¶13 To clarify harmless error, the ***Lindell*** court cites to ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992), one of the last major jury bias cases before ***Ramos***:

> There is no constitutional right to peremptory challenges; there is only a constitutional right to an impartial jury. Any claim that a jury is not impartial must focus not on the jurors who were removed by peremptory challenges but on the jury that actually sat in the case. Where there is no showing that any of the actual jurors were biased, it would be speculative for a court to conclude that the jury would have been fairer if counsel had been allowed to preserve peremptory challenges on other, unspecified members of the jury venire.

Lindell, 2001 WI 108 at ¶81 (citations omitted).

¶14 Additionally, the ***Lindell*** court highlighted ***Traylor***'s holding that a defendant cannot prove prejudice unless he or she can show that the exhaustion of peremptory challenges left him or her with a jury that included an objectionable or incompetent member. ***Lindell***, 2001 WI 108 at ¶81.

¶15 In ***Lindell***, the defendant used the first of seven peremptory strikes to remove a prospective juror who should have been removed for cause. ***Id.*** at ¶5. The court concluded that the circuit court's error did not affect the substantial rights of the defendant. ***Id.*** The court also said that nothing in its opinion changes the fundamental law that an accused is entitled to be tried by an impartial jury. ***Id.*** at ¶118. Instead, this decision requires a defendant to make a conscious choice between exercising a peremptory challenge or waiting for a Sixth Amendment challenge after conviction. ***Id.*** As a result, this puts the State in the position to either (1) join the defendant in urging the court to remove a juror for cause, (2) exercise one of its own limited peremptory strikes to remove a juror who should have been removed for cause, or (3) risk a new trial if an appellate court finds that a biased juror sat on the jury. ***Id.*** The court believes that the defendant's right to peremptory challenges will be effectively vindicated when prosecutors have an interest in seeing that jurors biased against the defendant never sit. ***Id.***

¶16 Based on the analyses used in ***Lindell***, we conclude that Dasko was not deprived of her right to an impartial jury nor was the full benefit of her peremptory rights affected. She was fairly tried by an impartial jury and the use of one of her four peremptory challenges guaranteed this impartiality. The trial court's decision not to remove the juror for cause, in this case, amounted to harmless error; therefore, Dasko is not entitled to a new trial.

By the Court.—Judgment affirmed.

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