COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1187-CR **Cir. Ct. No. 2003CF7122**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARDO HERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. Bernardo Hernandez appeals from a judgment of conviction and orders denying his postconviction motion. We conclude that he raises three issues: (1) denial of his due process rights because the trial court failed to obtain a personal waiver from Hernandez of his right to be present after

the trial began at the in-chambers questioning of jurors; (2) denial of his due process rights because the trial court ordered him shackled during trial; and (3) the trial court's denial of his motions for mistrial based on several claims of jury bias. We affirm.

BACKGROUND

¶2 Hernandez was charged with two counts of first-degree intentional homicide while armed with a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.63(1) (2005-06),[1] as a result of a bloody tavern fight in which Hernandez fatally shot one person, and shot, assaulted and ultimately killed a second individual by repeatedly hitting the victim with the gun, a broken bottle and his fists, as well as kicking and stomping on the victim. Hernandez conceded that he killed both people but claims that he acted in self defense. The jury convicted Hernandez on both charges. Hernandez appealed. Facts relating to each legal issue addressed will be provided in our discussion below.

DISCUSSION

¶3 Hernandez raised five points of error in his appeal: (1) the trial court violated his constitutional and statutory right to be present at all aspects of his trial by excluding him from the questioning of the jurors in chambers on the second day of trial; (2) the trial court violated his due process rights when it ordered him to wear a stun belt and ankle shackles during trial; (3) the trial court violated his due process rights by denying his motion for mistrial after it was brought to the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court's attention that some of the jury may have believed him to be shackled during the trial; (4) the trial court violated his due process rights and right to an impartial jury by failing to investigate jury comments regarding Hernandez's being shackled during trial and as to his guilt; and (5) the trial court violated his right to an impartial jury by allowing a juror to sit on his panel who had reached his verdict prior to the close of evidence and jury deliberations. We consider that his claims actually fall into three categories and discuss them in that manner. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."). Accordingly, Hernandez's claims are: (1) his due process rights were violated because he was not present during the mid-trial jury questioning; (2) his due process rights were violated because he was shackled during the trial; and (3) he was deprived of an impartial jury because the jury was aware that he was shackled, and a juror prematurely determined his guilt.

I. Presence of defendant during mid-trial jury questioning

¶4 During Hernandez's opening argument, trial counsel admitted that Hernandez killed both victims, but argued that it was in self-defense, i.e., that what he did was necessary to prevent an actual or imminent lethal attack on himself and that "it was not [Hernandez] who needed to prove this." The only witness to testify on the first day of trial was one of the police officers who was the first to arrive on the scene after the 9-1-1 call.

¶5 The MILWAUKEE JOURNAL-SENTINEL newspaper reported the trial, and a copy of the morning newspaper had been left in the jury room. Before continuing testimony on the second day of trial, the trial court and counsel met in chambers to discuss that morning's newspaper article. The jurors were questioned

individually, outside the presence of the rest of the jurors, to determine the effect of this article on the jury. Because of the limited space in the court's chambers, and because of Hernandez's ankle shackles (which could not reasonably be concealed in the chambers), Hernandez's counsel waived Hernandez's presence during this questioning.

¶6 During questioning, one of the jurors commented on how "scary" Hernandez looked; while others commented on Hernandez's demeanor or stern expression. There was speculation on the part of three jurors as to whether Hernandez was restrained in some manner, and a report by two jurors that another juror stated that she thought she heard chains on one occasion during the trial on the previous day. The trial court instructed all jurors who mentioned hearing or joining in any discussion of shackles or Hernandez's demeanor of the need to follow the court's earlier instructions to not discuss the case before all of the evidence had been presented.

¶7 One juror, Karla S.M., acknowledged hearing a brief discussion on the merits of the case. She reported that juror Johnny B. said that "he had made a decision pretty much already but," she added "I assured him jokingly that we weren't supposed to talk about it. That he needed to listen to all of the evidence. And he kind of said 'yeah, I know that.'" On being questioned further, Karla S.M. stated that she "took it jokingly that he was formulating an opinion. I didn't really take it seriously." When asked by the court to "relate exactly what … [Johnny B.] said as best [she] can remember and what the whole conversation was," Karla S.M. stated:

> It was so short that I guess my concern or my focus was in being told yesterday not to discuss it amongst ourselves. I was more concerned in keeping it short and off. Turning it off, as opposed to really remembering specifically what he

> said. Because it was in such a low tone as well, I know he was talking to me. But to tell you specifically what he said or remember word for word, I can't do that. I don't remember specifically. I just remember the gist of where he was coming from.

Karla S.M. told the court that Johnny B.'s whole conversation was "one or two sentences. That was it," and estimated the time involved as "seconds, a nanosecond pretty much." The court asked how she responded and Karla S.M. reported saying "Remember we're not supposed to discuss this and you're supposed to listen to all of the evidence before you actually make that decision," to which Johnny B. responded something to the effect of "yeah, I know," which ended the conversation.

¶8 The court withheld decision on the immediate motion for a mistrial by Hernandez's counsel. Instead, the court recalled Johnny B. after completing the questioning of all of the jurors. When asked whether he had formulated an opinion on Hernandez's guilt or innocence, Johnny B. replied:

> No, I haven't made [my mind] up. The thing is – The thing is the evidence is point[ing] towards him. But the thing is, he have [sic] to prove his innocence. That's the biggest thing. That's the biggest thing right there. You have to prove that it was self-defense. That's the biggest thing. That's [how] I look at it. I'm looking at was it self-defense. I listen to him. I listen to him yesterday, his opening statement, your opening statement about different things that happened, this and that.
>
> Now, yeah. Even the comments you made as far as he was there, the cops saw him do that, you say you even admitted to say yeah, he was there, this and that, that proves that. But the thing is we need to prove this was it self-defense. That's the biggest thing. That's what I'm looking at. Was it self-defense.
>
> ….
>
> I'm not assuming he [sic] guilty. I'm going off all your opening statements yesterday. And you all two opening statements yesterday point to him that yeah, he was there.

> He was the person that was there. You all both brought that up yesterday in your opening statements. So my thing I'm looking for is a self-defense that we looking for, you know. Was it a motive? What is it? That's what I'm looking for.

Johnny B. agreed that he could follow the judge's instructions on who has the burden of proving self-defense.

¶9 The trial court noted that Johnny B. was able to "repeat almost verbatim some of the things that were said" by both counsel during opening statements and that Johnny B. "demonstrated a fairly good understanding [of] what concepts the lawyers were talking about in their openings." The trial court specifically stated that it was satisfied by Johnny B.'s responses that he would follow its instruction to not formulate an opinion, or discuss the merits of the case, until instructed to do so and that he would follow the instructions of the court. Finally, the trial court concluded that it was not going to remove Johnny B., or grant the mistrial counsel for Hernandez requested, because the trial court concluded it was not necessary based on this record.

¶10 The trial court reconvened in the courtroom without the jury, informed Hernandez what had occurred in chambers, and allowed the parties to make a record of what had occurred. Hernandez informed the court that he would have wanted to be at the juror questioning if he had been asked. Hernandez's counsel renewed his request for a mistrial,[2] which the trial court again denied.

[2] During the hearing in chambers, Hernandez's counsel twice moved for a mistrial. It was denied both times. Counsel repeated the motion for mistrial on the record, in open court. Hernandez asserted no additional grounds for mistrial, either to the trial court or here, that were not raised by his counsel.

¶11 Hernandez contends that the trial court violated his constitutional and statutory rights under the Sixth and Fourteenth Amendments to the United States Constitution, article I, section 7 of the Wisconsin Constitution,[3] and WIS. STAT. § 971.04. The violation of his right to be present for all aspects of his trial occurred because the trial court allowed his counsel to waive Hernandez's presence during in-chambers questioning of jurors. The State argues that if the trial court erred, the error was harmless.

¶12 We interpret questions of constitutional and statutory law independently of the trial court, but benefitting from its analysis. ***State v. Anderson***, 2006 WI 77, ¶37, 291 Wis. 2d 673, 717 N.W.2d 74. A defendant has a constitutional and statutory right to be present during all aspects of his or her trial. A defendant's right to be present at trial includes the right "to be present whenever any substantive step is taken in the case." ***Id.***, ¶42. This right derives from the rights to due process and confrontation set forth in the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution and from WIS. STAT. § 971.04.[4] ***Anderson***, 291 Wis. 2d 673, ¶¶38, 41.

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[3] Hernandez makes no argument that the provisions of the Wisconsin Constitution relied upon differ from the Sixth and Fourteenth Amendments to the United States Constitution. Hence, we assume for purposes of this case that they are coterminous in the protections they provide.

[4] WISCONSIN STAT. § 971.04, "Defendant to be present," states, in pertinent part:

> **(1)** Except as provided in subs. (2) and (3), the defendant shall be present:
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> ….
>
> (b) At trial;
>
> (c) During voir dire of the trial jury;

(continued)

¶13 The right to be present may not be waived by counsel on a defendant's behalf. ***State v. Harris***, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). However, if error is found, a defendant is not automatically entitled to a new trial; denial of a defendant's right to be present during all aspects of his or her trial is subject to harmless error analysis. ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994); *see also* ***Anderson***, 291 Wis. 2d 673, ¶¶44-45 & nn.21-23 (citing ***State v. Burton***, 112 Wis. 2d 560, 569-70, 334 N.W.2d 263 (1983)).

¶14 On the second day of trial, before Hernandez was produced to court, the trial court, the State, and Hernandez's defense counsel discussed a concern that the jury may have been exposed to an article in that morning's MILWAUKEE JOURNAL-SENTINEL newspaper, especially because a copy of that newspaper had been left in the jury room. Because of the concern that in the small space in chambers, jurors would be exposed to Hernandez in shackles during questioning, defense counsel waived Hernandez's presence without consulting with him. The trial court accepted this waiver, even asking defense counsel to put the waiver on the record. Although given by counsel, and accepted by the court, in an attempt to *avoid* prejudice to Hernandez, this waiver and its acceptance was nonetheless error under the holding of ***Harris***. *See* ***id.***, 229 Wis. 2d at 839.

> ….
>
> (h) At any other proceeding when ordered by the court.
>
> **(2)** A defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his or her behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings.

¶15 We next consider whether the error was harmless. *See* ***David J.K.***, 190 Wis. 2d at 736. A constitutional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). The beneficiary of the error (the State) must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** (citations and internal quotations omitted).[5]

¶16 After the conclusion of the in-chambers questioning of the jurors, the proceedings returned to the courtroom outside the presence of the jury. Hernandez was present with his counsel. Hernandez and his counsel had time to confer about what happened during the in-chambers juror questioning. The trial court summarized on the record what had occurred. Hernandez's counsel and the State had the opportunity to supplement the court's summary. Hernandez told the court that he would have wanted to be present when the jurors were questioned, and would have so stated if he had been asked. Hernandez's counsel reasserted his motion for mistrial, arguing that the statement by Johnny B. was a premature determination of guilt, that it was so prejudicial that it tainted the entire jury, and that the comments about Hernandez being shackled demonstrated bias by the jury. The trial court denied the motion.

[5] As it noted in its decision in ***State v. Mayo***, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115, the supreme court has articulated the test for harmless error two ways: (1) constitutional error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,'" ***id.***, ¶47 (quoting ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999))); and (2) "the error is harmless if the beneficiary of the error proves '"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" ***Mayo***, 301 Wis. 2d 642, ¶47 (quoting ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967)).

¶17 During the trial, the jury was presented with the following evidence. Fifteen witnesses, including Hernandez, testified about what had occurred at the tavern on the evening of December 10, 2003. Hernandez admitted shooting both Jose Escobedo and Marco Castillo, but claimed that he acted in self-defense and in fear for his life, in that both victims were members of the Latin Kings gang and that during the evening one or both of them accused Hernandez of being a snitch. Hernandez testified that he shot Escobedo, with a gun dropped by Castillo and picked up by Hernandez, after Escobedo made "a slight move" toward Hernandez, who was coming up behind where Escobedo, Castillo and a third person were standing. Escobedo never moved after being shot. Hernandez said he then shot Castillo as Castillo was coming at him. The medical examiners testified that both victims had been shot in the back of their heads at close range, though in Castillo's case, the bullet passed under his brain, exiting through his mouth, and not killing him.

¶18 Several witnesses, including Hernandez, testified that after the shootings, Hernandez left the tavern, but shortly thereafter returned again. Several witnesses, including Hernandez, testified that Hernandez began fighting with Castillo after he returned to the tavern. Several witnesses testified that they saw Hernandez hitting Castillo with broken bottles, the gun, and his fists, as well as kicking and stomping on Castillo. Hernandez, however, testified that he never hit Castillo with a broken bottle, but rather, it was one of the other patrons who did so. Hernandez is the only one who testified that anyone else was involved in the altercation. One witness, a sign painter employed at the tavern that day to paint a mural, who was not acquainted with either Hernandez or the victims, testified that at some point in the altercation, Castillo was begging Hernandez to stop, but that it was only the arrival of the police officers that caused Hernandez to stop.

¶19 The medical examiner found over one hundred cuts, bruises, and indentations on Castillo's head and body that reflected that he had been hit repeatedly with a broken bottle and by the gun used by Hernandez to shoot Castillo. The medical examiner also noted that Castillo's injuries from the bullet would have had a concussive effect on him, that his leg could only have been broken by someone stomping on it with an extreme amount of force, and that he had cut tendons in his right hand that would have rendered that hand useless. Hernandez testified that he received two cuts on his head, some bruises and some cuts on his arms and legs as a result of his altercation with Castillo.

¶20 Based on the record, we determine that the trial court's error was harmless. First, as to the question regarding the various juror responses to questioning, because the trial court heard and saw the various juror responses and was in the best position to weigh their credibility, we accept these findings of fact. Hernandez does not suggest on appeal what additional inquiry he would have pursued. Motions for mistrial were made on Hernandez's behalf not once, but four times (twice in chambers, twice again in open court). All of these motions were based on the testimony of the jurors, which is part of the record and which we have reviewed. Second, the trial court record contains numerous facts from which a reasonable jury could conclude that Hernandez did not act in self-defense when he shot and killed Escobedo and Castillo. Because Hernandez was present at the proceedings in open court and had the opportunity then to request such additional relief as he felt proper,[6] because the relief requested was a mistrial for

[6] *See* ***State v. David J.K.***, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994) (where trial court errs in conducting portion of trial without defendant, but defendant and his or her counsel are of the same mind regarding the grounds for any motions or objections relating to that portion of the trial from which defendant was excluded, the error was harmless).

which his counsel vigorously argued, and because the record contains substantial evidence from which a jury could conclude that Hernandez did not act in self-defense, we conclude that the error in excluding Hernandez from the in-chambers questioning of jurors was harmless beyond a reasonable doubt.

II. The shackling

¶21 Hernandez argues that the trial court inappropriately exercised its discretion when it ordered him shackled during the trial, and that his shackling prejudiced the jury against him when the jury became aware of the restraints. He relies on the jurors' in-chambers testimony to support his conclusion that they were aware of the shackles.

¶22 The trial court informed the parties that it would be implementing certain security measures at the trial because of security concerns expressed by the Milwaukee County Sheriff's Department classifying Hernandez as a high-risk inmate. The trial court also considered the seriousness and the significant violence of the offense. *See* ***State v. Grinder***, 190 Wis. 2d 541, 552, 527 N.W.2d 326 (1995) (in determining whether shackling is necessary, trial court must consider "nature of the charges, the background of the defendant, and possible security risks to the courtroom"). The trial court determined that Hernandez would wear a stun belt and be shackled at the feet during trial, but that so none of the security measures would be observable by the jury, paper skirts were to be placed around both parties' tables to screen the legs from view, and Hernandez would be moved into, out of, and around the courtroom only outside the presence of the jury.

¶23 It is within a trial court's discretion to require the use of restraints during a judicial proceeding. ***Grinder***, 190 Wis. 2d at 550. A court properly exercises its discretion when it applies "a rational mental process by which the

facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** at 550-51 (citations omitted). "We must affirm if the discretion is exercised in accordance with the relevant law and facts, and we will 'search the record for reasons to sustain' that discretion." ***State v. LaCount***, 2007 WI App 116, ¶14, 301 Wis. 2d 472, 732 N.W.2d 29, *aff'd*, 2008 WI 59 (citation omitted).

¶24 The trial court stated its reasons on the record for requiring Hernandez to wear security restraints during trial. The trial court took reasonable precautions to avoid prejudice to Hernandez from jury observation of the security restraints. The facts in the record support the trial court's exercise of discretion in this decision. Hernandez's due process rights were not violated when the trial court exercised its discretion to impose these security measures.

III. Impartial jury

A. Jury awareness of shackling

¶25 Three jurors speculated about whether Hernandez was restrained when they were questioned in chambers. Two jurors said that another juror reported that she thought she heard chains on one occasion during the first day of trial. Contrary to the representation by Hernandez in his brief to this court, none of the jurors stated that they had seen any restraints on Hernandez. The trial court supervised and participated in the juror questioning. The trial court found the juror's representations were credible and that their comments about security were only speculation. The trial court observed that no juror indicated that their speculation had, or would have, any impact on their decision-making in the case. The trial court noted that it had again instructed each juror who mentioned hearing or participating in any discussion of the case on his or her duty to refrain from

discussing the case until the jury was sent to deliberate. The trial court denied Hernandez's motion for mistrial on these grounds.

¶26 Hernandez argues here that the trial court should have given a curative instruction to the entire jury. The trial court gave a curative instruction to each juror who said they heard or participated in a discussion about Hernandez and restraints. To have instructed jurors, who were unaware of the speculation about restraints, that they should disregard something of which they were unaware, would have caused the very harm the curative instruction was designed to cure. The trial court appropriately exercised its discretion as to giving a curative instruction and to whom.

B. Premature juror determination of guilt

¶27 Hernandez argues that juror Johnny B.'s comments during questioning on the second day of trial demonstrated that he was subjectively biased and, therefore, the trial court erred when it failed to either strike juror Johnny B. or grant Hernandez's motion for mistrial based on subjective juror bias.

¶28 Criminal defendants are guaranteed the right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution, as well as under principles of due process. ***State v. Smith***, 2006 WI 74, ¶18, 291 Wis. 2d 569, 716 N.W.2d 482; ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). A prospective juror is presumed impartial; therefore, when challenging the impartiality of a juror, the burden is on the challenger to that presumption to prove bias. ***Louis***, 156 Wis. 2d at 478 (citing ***Irvin v. Dowd***, 366 U.S. 717, 723 (1961); ***McGeever v. State***, 239 Wis. 87, 96, 300 N.W.2d 485 (1941)).

> Bias may be either implied as a matter of law or actual in fact. Even the appearance of bias should be avoided. The question of whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter of the [trial] court's discretion. The [trial] court must be satisfied that it is more probable than not that the juror was biased. A determination by the [trial] court that a prospective juror can be impartial should be overturned only where bias is "manifest."

Id. at 478-79 (citations omitted).

¶29 A juror can be statutorily, objectively or subjectively biased. ***Smith***, 291 Wis. 2d 569, ¶19. Subjective bias is revealed through the words and demeanor of the juror. ***Id.***, ¶20. Hernandez alleges subjective bias on the part of juror Johnny B. WISCONSIN STAT. §805.08(1) provides that a juror who has "expressed or formed any opinion, or is aware of any bias or prejudice in the case" shall be excused. *See* ***Smith***, 291 Wis. 2d 569, ¶20. Because the juror's subjective bias may only be revealed through words and demeanor, we generally defer to the trial court's assessment of the juror's honesty and credibility and will uphold a trial court's factual finding that a juror is not subjectively biased unless that determination is clearly erroneous. ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999).

¶30 Whether to grant a motion for mistrial is a decision that is committed to the sound discretion of the trial court. ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). The trial court must review the entire proceeding to determine "whether the claimed error is sufficiently prejudicial as to warrant a mistrial." ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998); ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). Where, as here, the defendant seeks a mistrial on grounds not related to conduct by the prosecution, we give the trial court's ruling great deference. *See* ***Bunch***, 191

Wis. 2d at 507. Where no mistrial was declared, "our review of this issue is limited to whether the trial court erroneously exercised its discretion in refusing to [grant a mistrial]." ***State v. Thurmond***, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655. Our review entails determining whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. ***Foy***, 206 Wis. 2d at 644.

¶31 Hernandez argues that his constitutional right to an impartial jury was violated when the trial court denied his motion for mistrial based on the responses of juror Johnny B. to questioning on the second day of trial. Our standard of review of a constitutional claim is mixed. We will uphold a trial court's findings of evidentiary and historical facts unless they are clearly erroneous. ***Hampton***, 217 Wis. 2d at 621. However, we determine independently whether Hernandez's constitutional right to a trial with an impartial jury was violated. ***Id.***

¶32 Hernandez argues that Johnny B.'s comments, as related by another juror, together with his responses to the trial court's questioning about whether he had already reached a verdict, show that Johnny B. was subjectively biased. We are not persuaded.

¶33 As we have explained, the trial court noted that Johnny B. was able to "repeat almost verbatim some of the things that were said" by both counsel during opening statements and that Johnny B. "demonstrated a fairly good understanding [of] what concepts the lawyers were talking about in their openings." The trial court specifically stated that it was satisfied by Johnny B.'s acknowledgment that he would follow the court's instruction to not formulate an opinion, or discuss the merits of the case, until instructed to do so and that he

would follow the instructions of the court on the legal issue of self defense. The trial court concluded that it was not going to remove Johnny B. from the jury, or grant the mistrial Hernandez was requesting, because neither remedy was necessary based on the record. Effectively, the trial court found that Hernandez had not demonstrated subjective bias by Johnny B. because he failed to overcome the presumption that a juror is unbiased, ***Louis***, 156 Wis. 2d at 478, and because Hernandez had not established that subjective bias, the basis for his mistrial request was not sufficiently prejudicial to warrant a new trial, ***Bunch***, 191 Wis. 2d at 506-07.

¶34 Based upon our review of the entire record in this case, we determine that the facts in the record amply support the trial court's exercise of discretion on this issue and that Hernandez was not denied his constitutional right to an impartial jury. There was no error in refusing to grant a mistrial.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.