

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1887-CR

Cir. Ct. No. 2006CT538

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD M. ARNDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Ronald Arndt appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration while having a minor passenger under sixteen years of age in violation of WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

§§ 346.63(1)(b) and 346.65(2)(f). Arndt contends the circuit court erred when it denied his motion to strike juror eight for cause during voir dire. We conclude that the circuit court's decision was not clearly erroneous, and we therefore affirm.

BACKGROUND

¶2 Ronald M. Arndt was charged with operating a motor vehicle while under the influence of an intoxicant with a minor passenger under the age of sixteen and operating a motor vehicle with a prohibited alcohol concentration while having a minor passenger under sixteen years of age in violation of WIS. STAT. §§ 346.63(1)(a) and (b) and 346.65(2)(f), both as second offenses.

¶3 The case was set for a jury trial. During voir dire, juror eight indicated that a drunk driver had seriously injured a close friend. Arndt's counsel asked juror eight whether this fact would affect her ability to be fair during the trial, to which juror eight responded, "Maybe a little." After further discussion, Arndt's counsel again asked juror eight if the incident would have an impact on her being fair in the current OWI case. She responded, "A little bit."

¶4 The circuit court stated that no one thinks drunk driving is an acceptable behavior, but that jurors have a duty to presume innocence until the State has proven the charge beyond a reasonable doubt. The court stated, "I need you to tell me whether you can separate the incident with your friend from this case and judge this case based on the facts that you hear in court and based on the law that I give you at the end of the day. Will you be able to do that?" Juror eight responded by nodding her head. The circuit court then asked juror eight to speak out loud. Juror eight responded by saying, "Yes."

¶5 The circuit court then offered Arndt’s counsel an opportunity to follow up with juror eight, but defense counsel did not do so. At the conclusion of voir dire, Arndt’s counsel moved to strike juror eight for cause based on her voir dire answers. The circuit court denied the motion. A jury was impaneled and included juror eight. The jury returned a verdict of not guilty of the charge of operating a motor vehicle while under the influence of an intoxicant, and guilty of the charge of operating a motor vehicle with a prohibited alcohol concentration. Arndt contends that the circuit court erroneously declined to strike juror eight for cause.

DISCUSSION

¶6 We are to uphold the circuit court’s factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous. *State v. Faucher*, 227 Wis. 2d 700, 719, 596 N.W.2d 770 (1999). A circuit court’s discretionary determination that a prospective juror can be impartial “should be overturned only where the prospective juror’s bias is ‘manifest.’” *State v. Ferron*, 219 Wis. 2d 481, 496-97, 579 N.W.2d 654 (1998), *overruled on other grounds by State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. We employ the clearly erroneous standard because the circuit court is in a unique position to assess a prospective juror’s demeanor and tone. *State v. Oswald*, 2000 WI App 3, ¶5, 232 Wis. 2d 103, 606 N.W.2d 238.

¶7 Arndt contends that juror eight was subjectively biased. Subjective bias refers to the prospective juror’s state of mind, and is revealed through the words and demeanor of the prospective juror. *Faucher*, 227 Wis. 2d at 717. To determine subjective bias, we inquire “whether the record reflects that the juror is 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) (citation omitted). We conclude that subjective bias was not demonstrated in the present case.

¶8 While it is true that juror eight initially expressed some concern about being able to fairly judge the case, the circuit court took proper steps to ensure that the juror was able to set aside any bias that existed. To the court’s question whether she could separate the incident involving her friend from the present case, and judge this case on the facts she would hear in court and the law the court would provide, juror eight first nodded her head and then answered “yes.” It is clear from the record that the court interpreted these non-verbal and verbal responses as an affirmative answer to its inquiry regarding juror eight’s ability to be impartial. The circuit court then indicated that it was satisfied with juror eight’s response. Arndt’s counsel was apparently not confused about her response because he chose not to follow up with juror eight, and instead resumed general questioning of prospective jurors.

¶9 “[A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality.” *Oswald*, 232 Wis. 2d 103, ¶6 (citation omitted). Rather, “[t]he manner in which the juror says the words and the body language he or she exhibits while answering speaks volumes—volumes that are not transmitted to a reviewing court via the cold record.” *Id.* Our inability to review demeanor and assess credibility is precisely why we leave the determination of subjective bias to the reviewing court. We conclude, based on the record, that the circuit court did not err when it declined to strike juror eight for cause.

¶10 For the above reasons, we affirm the circuit court's denial of Arndt's motion to strike juror eight. Judgment is affirmed.

By the Court.—Judgment affirmed.

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

