COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3299-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK E. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Reversed and cause remanded.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. Mark E. Smith appeals two convictions of child enticement, contrary to § 948.07(1), STATS. He asserts that he was forced to use a peremptory strike to remove a juror whom the court should have excused for cause, and therefore, he was denied his statutory right to a full complement of peremptory strikes. Smith also ascribes error to the lack of specificity in the

verdict forms and the jury instructions, which he contends denied his right to a unanimous verdict for each conviction. Because we agree with Smith that the juror's statements showed bias was manifest, which showing required the juror to be excused, and because neither the jury instructions nor verdict form, nor any exhibit admitted at trial, tied a specific incident to a specific count, we reverse Smith's convictions and remand to the circuit court to dismiss Counts III and IV against him, as it has already done with Counts I and II.

BACKGROUND

Smith was charged with four counts of child enticement, contrary to § 948.07(1), STATS., based on two encounters with H.L.H. and S.R.R. on September 25, 1996, when both girls were fourteen years of age. During *voir dire*, one of the jurors, Ms. Amans, voiced a concern about being able to be a fair and impartial juror because the case involved child enticement. Initially, when she was asked if she could be fair and impartial, she said, "I don't think I could." After repeating to defense counsel that she believed she would have a hard time being fair, the court entered into the questioning:

> THE COURT: Let me follow that up with Ms. Amans. Obviously you haven't heard any of the evidence at this point.
>
> MS. AMANS: Right.
>
> THE COURT: And obviously there is no evidence before the jury at this point, because there haven't been any witnesses sworn or any exhibits marked. Can you — are you telling us that you can't, having heard nothing about this case, be able to render a fair and impartial verdict based upon the evidence after you hear it?
>
> MS. AMANS: I would try to, yeah. I would give it a try.
>
> THE COURT: And I can't ask you to promise something you have never experienced before, but what I'm asking is,

> would you base your decision on the evidence, one way or the other, as you hear the evidence and in discussions with the other jurors?
>
> MS. AMANS: Yes.
>
> MR. BENSKY: So that you think, not only you could try, but actually do it?
>
> MS. AMANS: I mean it's a pretty tough — it's a sensitive subject, so I don't know. I mean, the other trial I was on was just about mechanical stuff. I just don't — I would give it a try, but I can't say yes, I would be fair. I don't know.

At that point, defense counsel requested that the court remove her for cause and the court refused to do so. Smith was then forced to use a peremptory strike to remove Amans from the jury panel.

H.L.H. and S.R.R. both testified at trial. They said that on the evening of September 25, 1996, while they were walking H.L.H.'s two dogs, Smith drove up and stopped near them. The girls testified that Smith rolled down the car's window on the passenger side and spoke to them, without getting out of the car. He commented about their dogs and then asked them if they were busy that night. They assured him that they were and he drove away. The girls were able to get his car's license number. They returned to H.L.H.'s house, where they informed her mother of what had occurred. She advised them to call the Madison Police Department, which they did. While they were at H.L.H.'s house waiting for the police, H.L.H. and S.R.R. reported that they observed Smith drive by two or three times. When the police arrived, the girls related their story and called S.R.R.'s mother. Later, both girls walked to the bus stop on Johnson Street where S.R.R. was to take a bus home. While they were waiting for the bus, H.L.H. said Smith again drove up and asked them if they were "positively sure" that they were busy that night. H.L.H. said they were and both girls ran back to H.L.H.'s home.

Still later on the same evening, when the girls were once again on their way to the bus stop, they observed police officers had stopped a car which appeared to be similar to the one they observed. They went to the police stop and identified Smith at that time.

Smith also testified at trial. He did not deny speaking to the girls at the corner of Mifflin and Seventh Street, but he denied stopping or talking with them at the bus stop on Johnson Street. He also denied that he ever tried to entice the girls to get into his car or that his stopping to speak with them was motivated by purposes contrary to law.

Smith's proposed jury instructions differentiated between the incident which was alleged to have occurred on Mifflin and Seventh Street, and that which the girls said occurred at the bus stop on Johnson Street. However, the court did not give the instructions he requested. The jury instructions given by the court for child enticement repeated the language used in the Information for Counts I, II, III and IV, which did not designate the specific incident that related to each count in the Information. Smith's counsel repeated his objection to the lack of specificity when the court presented the verdict forms, but the court did not accede to his request to make the verdict forms reflective of the specific incident that related to each count of child enticement.

The jury acquitted Smith of Count I, which related to H.L.H. and of Count II, which related to S.R.R., but it convicted him of Count III, relating to H.L.H. and Count IV, relating to S.R.R. The wording of Counts I and III in the Information are identical. Likewise, the wording in Counts II and IV of the Information are identical.

Smith's postconviction motions were denied and this appeal followed.

DISCUSSION

Standard of Review.

Whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter within the circuit court's discretion. ***State v. Ramos***, 211 Wis.2d 12, 15, 564 N.W.2d 328, 330 (1997) (citations omitted). However, an appellate court will review *de novo* whether a juror's bias is "manifest." *See* ***State v. Ferron***, 219 Wis.2d 481, 496-97, 579 N.W.2d 654, 660 (1998) (citations omitted).

When a jury verdict contains multiple counts, we will evaluate *de novo* whether a defendant's right to a unanimous jury verdict has been impaired. *See* ***State v. Marcum***, 166 Wis.2d 908, 915, 480 N.W.2d 545, 549 (Ct. App. 1992).

Juror Bias.

Every defendant in a criminal trial has a constitutional and a statutory right to a fair and impartial jury. U.S. CONST. amend. VI; WIS. CONST. art. 1, § 7; § 805.08(1), STATS. In order to protect the right to a fair and impartial jury, any prospective juror whose bias is "manifest" must be excused. ***Ferron***, 219 Wis.2d at 496-97, 579 N.W.2d at 660; ***Patton v. Yount***, 467 U.S. 1025, 1031-32 (1984). While bias is not a technical concept, because it involves a state of mind, the Wisconsin Supreme Court has directed that a juror's bias is "manifest" whenever the record "(1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior

knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge." ***Ferron***, 219 Wis.2d at 498, 579 N.W.2d at 661. Therefore, when potential bias is examined, the first prong of the ***Ferron*** test requires the circuit court to assess the demeanor and disposition of each prospective juror to put aside preconceptions and to be fair and impartial. The second prong requires it to determine whether, under the particular circumstances surrounding the *voir dire* of the particular juror, no reasonable juror could ever set aside the bias or opinion which is the cause for concern. ***Id.*** at 498-501, 579 N.W.2d at 661-62. We apply the same tests on appeal, giving deference to those portions of the circuit court's assessment that rely on the demeanor of the prospective juror.

In ***Ferron***, after questioning by the court, the juror opined that he could "probably" set aside his prior opinion that if a defendant were not guilty, he would testify at trial. The juror's response of "probably" was held to be "insufficient to indicate a sincere willingness" to set aside his bias against the defendant's exercising his constitutional right not to testify. ***Id.*** at 501, 579 N.W.2d at 662. Here, juror Amans's last words to the court were, "I would give it a try, but I can't say yes, I would be fair. I don't know." While Amans's willingness to try to be impartial is laudatory, and while circuit courts do need to closely question jurors when bias is a concern, there are insufficient positive assurances of impartiality in the record for us to uphold a decision that Amans had a sincere willingness to set aside her bias. Therefore, we conclude Amans's bias is manifest and the circuit court erred by not excusing her.

A defendant in a criminal trial has a statutory right to exercise a certain number of peremptory strikes during jury selection. *See* §§ 972.03 and 972.04(1), STATS.; ***Ramos***, 211 Wis.2d at 18-19, 564 N.W.2d at 331. When the

circuit court fails to dismiss a juror who should have been dismissed for cause and thereby forces a defendant to use one of his peremptory challenges to correct the circuit court's error, he is deprived of his statutory right to a full complement of peremptory challenges. ***Ramos***, 211 Wis.2d at 24-25, 564 N.W.2d at 334. The denial of that statutory right due to circuit court error requires reversal of a defendant's conviction. ***Id.***

Here, Smith was forced to use one of his peremptory strikes to remove Amans. This is similar to the error that was reviewed in ***Ramos*** and also in ***Ferron***. Therefore, we are compelled to conclude that because Smith was forced to use one of his statutorily granted peremptory challenges in order to correct the circuit court's error, he was denied his statutory right to a full complement of peremptory strikes and his convictions must be reversed. ***Ferron***, 219 Wis.2d at 505, 579 N.W.2d at 664.

Unanimity.

Smith was charged in the Information and tried before the jury on four counts of child enticement. The jury found him guilty of two counts and acquitted him of two counts. He asserts that there was a lack of specificity in the verdict form and that there was a lack of specificity in the jury instructions because both repeated the language used in the counts set out in the Information, which did not specify which incident was related to which count.

In a criminal case, defendants have a Sixth Amendment right to a unanimous verdict and a Fifth Amendment due process right to verdict specificity. ***Marcum***, 166 Wis.2d at 912, 480 N.W.2d at 548. When a defendant is charged with multiple crimes, he has a constitutional right to have a unanimous jury determination of which act resulted in which count in the jury's verdict. ***Id.*** at

919, 480 N.W.2d at 551. A unanimity problem can be avoided by jury instructions that tell the jurors they must be unanimous about the specific acts which form the basis for each count. ***Id.*** at 918, 480 N.W.2d at 551 (citing ***State v. Gustafson***, 112 Wis.2d 369, 379, 332 N.W.2d 848, 852-53 (Ct. App. 1983). Unanimity problems can also be avoided by special verdict forms which focus specifically on the conduct that relates to each count in the verdict. ***Marcum***, 166 Wis.2d at 918, 480 N.W.2d at 551.

In order for this court to be permitted to review instructions and verdict forms based upon an alleged lack of unanimity or specificity, there must have been an objection in this regard before the circuit court. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Here, defense counsel did just that when he stated, "[M]y objection and request for the record, Your Honor, would be that the verdict form somehow differentiate which incident each verdict form was intended to apply to, so there is some differentiation in 1 and 2 refers to 3 (sic), compared to 3 and 4."

The jurors convicted Smith of Counts III and IV, but they acquitted him on Counts I and II. However, the words used in the Information, and repeated to in the jury instructions, for Counts I and III[1] are identical with the words used in

[1] MARK E. SMITH, in said County, on September 25, 1996, in the City of Madison, against the peace and dignity of the State of Wisconsin, did, with intent to have sexual contact or sexual intercourse with a child, H.L.H., d/o/b 03/08/82, who had not attained the age of eighteen years, attempt to cause H.L.H. to go into a vehicle; contrary to section **948.07(1)** of the Wisconsin Statutes, a class C felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), imprisoned not more than ten (10) years or both.

AND AS A THIRD AND SEPARATE OFFENSE: that MARK E. SMITH, in said County, on September 25, 1996, in the City of Madison, against the peace and dignity of the State of

(continued)

the Information for Counts II and IV.[2] The jury instructions incorporated the language of the Information, so they were also nonspecific in regard to which incident related to which count. Because there was specificity neither in the instructions nor in the verdict form, nor in any exhibit admitted into evidence, the jury's attention was not properly focused on whether the incident which was alleged to have occurred on the corner of Mifflin and Seventh was the incident that resulted in the first two counts or whether it was the incident that was alleged to have occurred at the Johnson Street bus stop.

> Wisconsin, did, with intent to have sexual contact or sexual intercourse with a child, H.L.H., d/o/b 03/08/82, who had not attained the age of eighteen years, attempt to cause H.L.H. to go into a vehicle; contrary to section **948.07(1)** of the Wisconsin Statutes, a class C felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), imprisoned not more than ten (10) years or both.

[2] AND AS A SECOND AND SEPARATE OFFENSE: that MARK E. SMITH, in said County, on September 25, 1996, in the City of Madison, against the peace and dignity of the State of Wisconsin, did, with intent to have sexual contact or sexual intercourse with a child, S.R.R., d/o/b 05/28/82, who had not attained the age of eighteen years, attempt to cause S.R.R. to go into a vehicle; contrary to section **948.07(1)** of the Wisconsin Statutes, a class C felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), imprisoned not more than ten (10) years or both.

AND AS A FOURTH AND SEPARATE OFFENSE: that MARK E. SMITH, in said County, on September 25, 1996, in the City of Madison, against the peace and dignity of the State of Wisconsin, did, with intent to have sexual contact or sexual intercourse with a child, S.R.R., d/o/b 05/28/82, who had not attained the age of eighteen years, attempt to cause S.R.R. to go into a vehicle; contrary to section **948.07(1)** of the Wisconsin Statutes, a class C felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), imprisoned not more than ten (10) years or both.

The State argues that obviously the incident which related to the convictions was that which occurred on Johnson Street at the bus stop because it was the second incident and the numbers three and four occur after the numbers one and two in the counts set forth in the Information. Stated another way, it is the State's position that the jurors probably took a "chronological approach" in regard to which incident related to which charges in the Information. However, the State's argument is simply speculation because there is absolutely nothing in the record which ties either of the incidents to the verdict forms or to the instructions the jury was given. Constitutional rights cannot be satisfied by speculation. It was the State's burden to state with specificity which incident related to which parts of the verdict. It did not meet that burden. Therefore, we conclude Smith's right to a unanimous verdict has been impaired.

Because Smith was acquitted of Counts I and II and because it is not possible to know with certainty which incident related to those counts, we cannot remand for a new trial of Counts III and IV, as Smith might be retried for the incident on which the jury has determined he is not guilty. Therefore, we reverse and remand for the circuit court to dismiss Counts III and IV, with prejudice.[3]

CONCLUSION

Smith's statutory right to a full complement of peremptory strikes was impaired when he was forced to use a peremptory strike to remove a juror whose bias was manifest. Additionally, Smith's right to a unanimous jury verdict for each count of which he was convicted was violated when the circuit court did

[3] Because we remand to the circuit court to dismiss Counts III and IV, we do not address the sufficiency of the evidence.

not differentiate which incident related to which count in the special verdict forms or in the jury instructions. Therefore, his convictions are reversed and this cause is remanded with directions to dismiss Counts III and IV, with prejudice.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.