COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1254

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL W. LANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J. Michael W. Lang appeals from a forfeiture judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to § 346.63(1)(b), STATS. The judgment was entered following a jury verdict of guilty. The jury acquitted Lang on a companion charge of operating a motor vehicle while intoxicated (OWI) pursuant to § 346.63(1)(a), STATS.

¶2 On appeal, Lang contends that the trial court erred by using the jury selection procedures set out in § 345.43(3)(b), STATS. Lang contends that this procedure deprived him of his constitutional right to a fair and impartial jury because the trial court required the parties to take their peremptory strikes before conducting voir dire of the prospective jurors. We reject this argument.

¶3 Lang also contends that the court erred by refusing to grant his request to strike a juror for cause. We agree. We hold that the juror was objectively biased. We reverse the judgment and remand for a new trial.

¶4 We will recite the relevant facts during the course of our discussion of the issues.

Discussion

¶5 Although we reverse and remand this case on the basis of the trial court's failure to strike a juror for cause, we nonetheless address Lang's threshold argument that the trial court erred by using the jury selection procedures set out in § 345.43(3)(b), STATS. We do so because this issue may arise again during the retrial.

1. Section 345.43(3)(b), STATS.

¶6 Section 345.43(3)(b), STATS., provides:

> If a timely demand for a jury is made, the judge shall direct the clerk of the court to select at random from the prospective juror list the names of a sufficient number of prospective jurors, from which list either party may strike 5 names. If either party neglects to strike out names, the clerk shall strike out names for the party. The judge shall permit voir dire examinations and challenges for cause. The clerk shall summon a sufficient number of persons whose names are not struck out, to appear at the time and place named in the summons.

¶7 Lang was cited for OWI and PAC. He demanded a twelve-person jury and paid the requisite fee. Before the scheduled trial date, the clerk of courts provided the parties with the list of prospective jurors as contemplated by § 345.43(3)(b), STATS.[1] Pursuant to the statute, the trial court required the parties to take their peremptory strikes the day before the scheduled trial. Lang objected because this procedure required him to take his peremptory strikes without the benefit of voir dire. The trial court denied Lang's objection.

¶8 We begin by setting out our understanding of Lang's argument. Lang complains that the trial court utilized the procedures of § 345.43(3)(b), STATS. As a result, Lang contends that he was denied his due process right to a fair and impartial jury because he was forced to take his peremptory strikes without the benefit of voir dire. We view that argument as a challenge to the constitutionality of the statute, although Lang does not couch his argument in those express terms.

¶9 In support, Lang cites to ***State v. Delgado***, 223 Wis.2d 270, 588 N.W.2d 1 (1999). There the supreme court ordered a new trial in a criminal case where a juror had provided incorrect or incomplete responses to material questions posed during voir dire. *See* ***id***. at 286-87, 588 N.W.2d at 8. In the course of its discussion, the court stressed the importance of voir dire and the need for accurate and complete answers by prospective jurors on voir dire examination. *See* ***id***. at 279-80, 588 N.W.2d at 5. We agree with the supreme court's statement regarding the importance of voir dire, but we conclude that ***Delgado*** does not apply in this case. ***Delgado*** was a criminal case. This is a civil forfeiture case. Lang does not

[1] The jury selection procedures set out in § 345.43, STATS., apply to traffic regulation forfeiture actions. *See* Judicial Council Notes—1996, WIS. STAT. ANN. § 345.43 (West 1999).

cite any authority holding that voir dire is a constitutional requirement in civil forfeiture cases.[2]

¶10 Lang also supports his constitutional argument with ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997). There, the trial court erroneously refused to strike a juror for cause. As a result, the defendant was required to use a peremptory challenge, functionally giving the State an added peremptory challenge. *See* ***id***. at 24, 564 N.W.2d at 334. That situation does not exist in this case. Section 345.43(3)(b), STATS., allocates five peremptory strikes to each side. Pursuant to the statute, both parties exercised their peremptory strikes. That procedure was not tainted by any erroneous trial court rulings as to strikes for cause because the voir dire process came later. Recently, in a case which presented the "flip side" of ***Ramos***, our supreme court held that the erroneous dismissal of a prospective juror was not grounds for reversal where the State and defense nonetheless were accorded an equal number of peremptory challenges. *See* ***State v. Mendoza***, 227 Wis.2d 838, 860-61, 596 N.W.2d 736, 747 (1999). Therefore, even assuming that Lang's constitutional argument applies in this civil forfeiture case, we reject it.

¶11 We affirm the trial court's application of § 345.43(3)(b), STATS., and we reject Lang's constitutional challenge to the statute.

2. Juror DeNoyer

¶12 Lang argues that the trial court erred by refusing to grant his request to strike juror Cheryl DeNoyer for cause. We agree.

[2] Section 345.43(3)(b), STATS., does not eliminate voir dire. Instead, it defers voir dire until after the parties have taken their five peremptory strikes. *See* ***id.*** ("The judge shall permit voir dire examinations and challenges for cause.")

¶13 The voir dire examination of DeNoyer included the following responses. The assistant district attorney who prosecuted this case had represented DeNoyer and her husband about ten years earlier in a civil matter. DeNoyer described the experience as very positive. DeNoyer also expressed her belief that the legal system does not always seek the truth and that "it's more or less what one attorney or one side can represent and talk about and maybe they won't give the whole truth." In addition, at the time of this case, DeNoyer's husband was doing remodeling work for an assistant district attorney.[3] DeNoyer gave varying and inconsistent answers as to whether she could serve as a fair and impartial juror. She variously responded that she could fairly serve, that she would try, that she was uncertain, and that she was "not sure that [she] would be a good person to sit in judgment of somebody."

¶14 Lang asked that DeNoyer be struck for cause. The trial court denied the request. The court reasoned that DeNoyer's answers were based on the "idea that she had never been through this before, and for that reason wasn't sure." The court also stated that DeNoyer's answers indicated her "honesty and sincerity rather than any doubts which were not specifically enunciated in her testimony."

¶15 Recently, the supreme court decided a series of cases concerning juror bias.[4] In those cases, the court adopted new terminology for juror bias: statutory bias, subjective bias, and objective bias. *See* ***State v. Faucher***, 227 Wis.2d 700, 716-19, 596 N.W.2d 770, 777-79 (1999). This case does not present

[3] The record is unclear whether this reference was to the assistant district attorney representing the State. We assume it was another assistant district attorney.

[4] These decisions were issued after the trial in this case.

any issue of statutory bias. Rather, the question is whether DeNoyer was subjectively or objectively biased.

¶16 Subjective bias "inquires 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, 764 (1999). This kind of bias is revealed through the words and the demeanor of the prospective juror. *See* ***Faucher***, 227 Wis.2d at 717, 596 N.W.2d at 778. Whether a prospective juror is subjectively biased turns on his or her responses on voir dire and a circuit court's assessment of the individual's honesty and credibility, among other relevant factors. *See* ***id***. at 717-18, 596 N.W.2d at 778. We will uphold a circuit court's finding that a prospective juror is or is not subjectively biased unless the finding is clearly erroneous. *See* ***id***. at 718, 596 N.W.2d at 778.

¶17 Here, although we view the question as very close, we conclude that the trial court's finding that DeNoyer was honest and sincere equates with a finding that she was not subjectively biased. Given the trial court's superior position to assess the demeanor and disposition of a prospective juror, *see* ***id***., we uphold that determination.

¶18 On the other hand, objective bias focuses not upon the individual prospective juror's state of mind, "but rather upon whether the reasonable person in the individual juror's position could be impartial." ***Id***. at 718, 596 N.W.2d at 779. This inquiry asks whether "there is a reasonable possibility that the information in [the juror's] possession would have a prejudicial effect upon a hypothetical average juror." ***Id.*** at 719, 596 N.W.2d at 779 (alteration in original) (quoting ***State v. Messelt***, 185 Wis.2d 254, 282, 518 N.W.2d 232, 243 (1994)).

An objective bias inquiry presents a mixed question of fact and law. *See* ***id***. at 720, 596 N.W.2d at 779. A circuit court's findings regarding the facts and circumstances surrounding the voir dire will be upheld unless they are clearly erroneous. However, whether those facts fulfill the legal standard of objective bias is a question of law. *See* ***id***. Although we do not ordinarily give deference to a trial court's determination on a question of law, we give due weight to the court's determination in this setting because that determination is so intertwined with the court's factual findings. *See* ***id***.

¶19 Giving due weight to the trial court's factual findings, we nonetheless conclude that the voir dire responses of DeNoyer establish objective bias. We base our conclusion upon four factors, all revealed by the voir dire examination. First, DeNoyer and the assistant district attorney who prosecuted this case had a prior attorney/client relationship. Second, DeNoyer stated that this relationship had been a very positive one. Third, DeNoyer expressed her belief that the legal system does not always seek the truth and that "it's more or less what one attorney or one side can represent and talk about and maybe they won't give the whole truth." Fourth, DeNoyer's husband presently had a business/employment relationship with an assistant district attorney.

¶20 Standing alone, it may be that none of these factors would have rendered DeNoyer objectively biased. But viewed in toto, we have little hesitancy in concluding that there is a reasonable possibility DeNoyer's information and knowledge would have a prejudicial effect upon a hypothetical average juror. *See* ***id***. at 719, 596 N.W.2d at 779. This is especially so in light of DeNoyer's favorable impression of the assistant district attorney, coupled with her added belief that attorneys sometimes subvert the search for the truth. These responses suggested that DeNoyer would favor the assistant district attorney over Lang's

counsel in resolving factual disputes in the case. This suggestion was heightened by the current employment relationship of DeNoyer's husband with an assistant district attorney. We appreciate that DeNoyer disavowed any such favoritism, but the inquiry here is the likely effect of such information and knowledge upon the average hypothetical juror in DeNoyer's position—not DeNoyer's own subjective assessment of the situation.

¶21 Giving due weight to the trial court's ruling, we nonetheless conclude that DeNoyer was objectively biased and should not have served as a juror in this case. We reverse the judgment and remand for a new trial.

Conclusion

¶22 We hold that the trial court correctly utilized the procedures of § 345.43(3)(b), STATS., when impaneling the jury. We further hold that DeNoyer was objectively biased and that the trial court erred in refusing to strike this juror. We reverse the judgment and remand for a new trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.