COURT OF APPEALS DECISION DATED AND FILED

November 13, 2001

Cornelia G. Clark
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.**

No. 01-1594-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. ALBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Reversed and cause remanded with directions*.

¶1 FINE, J. A jury convicted Robert L. Albert of operating a motor vehicle with a prohibited blood-alcohol concentration of .10 percent. The jury also found him not guilty of operating a motor vehicle while under the influence of an intoxicant in connection with the same incident. He appeals from the judgment entered on the verdict of guilty, but mistakenly identifies it as being on the

operating-while-under-the-influence charge. We ignore this scrivener's error and decide the appeal on its merits.

¶2 Albert asserts two claims of trial-court error. First, he contends that the trial court should have granted a mistrial when a juror, Ronald D. Tischer, lied about telling someone during the trial that he was leaning towards finding Albert guilty. Second, he claims that the trial court erroneously exercised its discretion when it did not grant an adjournment because the State belatedly turned over discovery material. We reverse on the first issue, and, accordingly, do not discuss the second. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I.

¶3 The jury was selected on May 8, 2000. The trial court warned the jury, both before and after it was sworn, not to discuss the case, either amongst themselves or with anyone else before formal deliberations in the jury room. The trial continued on May 8 and 9, until the afternoon of May 10, when the jury returned its verdicts. After the conclusion of the testimony, but before the trial court instructed the jury and the parties made their closing arguments, Albert's lawyer told the trial court that he had just received a telephone call. The call was from a man whom he did not know who said that one of the jurors told the man the previous morning, as represented to the trial court by Albert's lawyer, that the juror "was planning on voting guilty." Albert's lawyer asked the trial court to *voir dire* each juror individually. The trial court refused. Rather, with the entire jury present, the trial court asked each juror to "stand and indicate whether or not you discussed this case with anyone while this case was pending." The jurors stood, in

turn, and indicated that they had not, including Tischer, who responded: "No, I have not."

¶4 After all the jurors denied discussing the case with anyone, the trial court segued into its instructions to the jury. After closing arguments, the trial court excused the alternate juror, and the jury began its deliberations.

¶5 When the court next convened on May 10, Albert's lawyer told it that the lawyer for the man to whom the juror allegedly spoke called and identified the man as Dean Skwierawski. Skwierawski had a case pending before the trial court and was in the courtroom during at least parts of Albert's trial. Skwierawski's lawyer said, however, that Skwierawski was not then available. The jury returned its verdicts at approximately 3 p.m. that day. Tischer was one of the jurors.

¶6 Before discharging the jurors, the trial court asked each of them to come into its chambers one at a time with the lawyers and a court reporter. Tischer admitted talking to others during breaks in the trial but said that his discussions were "not about the case." Later, he elaborated and, ultimately, changed his story:

> JUROR TISCHER: I think I saw one person that I said I was in this [court]room too; and I told him -- I didn't tell him about what the case was about or anything.
>
> THE COURT: Did he ask you what you thought about the case?
>
> JUROR TISCHER: He asked me, and I told him that I hadn't made my decision. The elevator came, and that was the end of the discussion.
>
> ...

> THE COURT: Did you mention something about leaning a certain way?
>
> JUROR TISCHER: I said I was toward the middle.
>
> THE COURT: So does that mean there was some kind of conversation about what was going on here?
>
> JUROR TISCHER: That was the end of the conversation right there. That was the only conversation I had pertaining to anything.
>
> THE COURT: All right.
>
> JUROR TISCHER: I only talked to this person for like 10 seconds maybe, and that was it. And the elevator door was there, and that was the end of the conversation.

Albert's lawyer then asked Tischer some questions:

> [ALBERT'S LAWYER]: And he asked you which way you were leaning, didn't he?
>
> JUROR TISCHER: I said I was leaning one way, but I wasn't sure. That was the end of the conversation.
>
> [ALBERT'S LAWYER]: You said that you were leaning one way. You told him that you were leaning towards guilty; didn't you? That's the one way that you told him that you were leaning?
>
> THE COURT: The truth now, sir. Just tell us the truth.
>
> JUROR TISCHER: I had not made up my mind.
>
> [ALBERT'S LAWYER]: I didn't say you had made up your mind. You told this guy that you were leaning one way. You told him that the one way that you were leaning was towards guilty. You told him you were leaning towards guilty, right? Think now.
>
> JUROR TISCHER: Yes. At that time I was leaning towards it, but I hadn't made up my mind at all.
>
> ...
>
> THE COURT: Let me ask you again about how much discussion you had with this gentleman. Now, it's clear you did say to him that you were leaning towards guilty, correct?

JUROR TISCHER: Right, and that's all he knows.

Albert's lawyer moved for a mistrial, which the trial court took under advisement although it recognized that "[t]here's no question that there was an impropriety here."

¶7 A little more than one month later, the parties appeared before the trial court again. The trial court noted that in the interim it spoke with the lawyer for Skwierawski with the prosecutor present. Albert's lawyer was not present at the interim meeting, but the trial court explained that it had only asked Skwierawski's lawyer if he "had … prepared anything or could he prepare something regarding what Mr. Skwierawski's position is as to what was said" between Skwierawski and Tischer. Albert's trial lawyer complained that he was "concerned if Mr. Skwierawski has a case pending before this Court, that Mr. Skwierawski might do something to ingratiate himself with this Court. I contend it poses a potential conflict of interest for this Court." Albert does not, however, seek reversal on this ground.

¶8 Approximately one month after the trial court revealed its discussion with Skwierawski's lawyer, the trial court denied Albert's motion for a mistrial. It concluded that there was no "basis to find that [Tischer]'s bias affected the opportunity for Mr. Albert to have a fair trial."

II.

¶9 A decision whether to grant or deny a motion for a mistrial lies within the trial court's discretion. ***State v. Mendoza***, 101 Wis. 2d 654, 659, 305 N.W.2d 166, 168–169 (Ct. App. 1981). Generally, juror misconduct of failing to be truthful occurs during pre-trial selection *voir dire*. *See, e.g.*, ***State v. Delgado***, 223 Wis. 2d 270, 272–273, 588 N.W.2d 1, 3 (1999) (juror did not disclose on *voir*

dire that she had been a child sexual-assault victim). In those cases, a defendant is entitled to a new trial if he or she shows that: 1) the juror "incorrectly or incompletely responded to a material question"; and 2) that "it is more probable than not" that the "juror was biased" against the defendant. ***State v. Messelt***, 185 Wis. 2d 254, 268, 518 N.W.2d 232, 238 (1994) (quoted source omitted). "Bias" may be "inferred" from "the facts and circumstances surrounding the prospective juror's answers during *voir dire*." ***Delgado***, 223 Wis. 2d at 283, 588 N.W.2d at 6. "Inferred" bias is now generally encompassed by the term "objective bias," which, when framed by the circumstances in which "objective bias" is generally alleged, means an assessment of "whether the reasonable person in the individual prospective juror's position could be impartial" irrespective of whether the juror is, in fact, biased. ***State v. Faucher***, 227 Wis. 2d 700, 716, 718, 596 N.W.2d 770, 778, 779 (1999). Stated another way, "[a] finding that a juror was honest and truthful and had no actual bias does not foreclose a finding of inferred [now "objective"] bias." ***Delgado***, 223 Wis. 2d at 283, 588 N.W.2d at 7.

¶10 On the other hand, and of special significance here, "evidence that a juror purposefully gave an incorrect response, deliberately concealed information, or engaged in other mendacious conduct may be sufficient to find bias." ***Messelt***, 185 Wis. 2d at 270 n.10, 518 N.W.2d at 238 n.10. This flows from our concern that there be the appearance as well as the fact of impartiality. *See* ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484, 488 (1990).

¶11 We defer to the trial court's determination on alleged juror bias, reversing only "if as a matter of law a reasonable judge could not have reached" that determination. ***Faucher***, 227 Wis. 2d at 721, 596 N.W.2d at 780. As with any discretionary determination, however, the trial court's decision must rest on a

firm foundation of the applicable law. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727, 732 (1982).

¶12 This case does not fit the normal pattern of juror-bias cases, which concern whether prospective jurors were sufficiently candid during pre-trial *voir dire*. Rather, Tischer not only disregarded the trial court's admonitions not to discuss the case with anyone, including his fellow jurors, before formal deliberations, but, moreover, when called on it, repeatedly lied until, finally, he let leak at least a few rays of truth. Sadly, however, we do not know, and, more important, given our deferential standard of review, the trial court did not know, whether the juror's final concession that he did, indeed, discuss the case with Skwierawski, whom he saw in the courtroom during the trial, is the complete truth or a mere sliver.

¶13 The trial court never heard testimony from Skwierawski, and, more important, neither Albert nor the State had a chance to examine both Skwierawski and Tischer to discover what happened:

- Was there only one comment as Tischer's final testimony represents, or was the discussion more detailed?
- If more detailed, what was the nature of that discussion?
- Did Skwierawski give Tischer *his* views on Albert's guilt or innocence? If so, this would have been forbidden extraneous information. *See* ***Messelt***, 185 Wis. 2d at 277–280, 518 N.W.2d at 242–243 (only one juror need be tainted by prejudicial extraneous information).
- If Skwierawski gave Tischer his views of Albert's guilt, did Tischer respond—either adopting or rejecting, in whole or in part, Skwierawski's observations?

We will never know the answers to these critical questions, and the trial court did not know, because, in a rush to finish the case, it never took the time to find out.

¶14 The closest case that we have been able to find that explores the need for the type of fact-finding the trial court should have had in this case is ***United States v. Resko***, 3 F.3d 684 (3d Cir. 1993). ***Resko*** concerned an allegation that jurors had been discussing the case amongst themselves during the trial. ***Id.***, 3 F.3d at 686. The trial court in ***Resko*** learned of the misconduct on the seventh day of what turned out to be a nine-day trial. ***Ibid.*** Rather than conduct what ***Resko*** characterizes as a "searching inquiry into the potential prejudice to the defendants from the jury's misconduct," the trial court submitted to the jury a two-part questionnaire, which asked: whether the juror answering the questionnaire participated in the discussion, and, if so, whether he or she "formed an opinion about the guilt or non-guilt of either defendant as a result." ***Id.***, 3 F.3d at 686, 688. "The jury was left alone in the courtroom while answering the questionnaires." ***Ibid.*** All of the jurors responded that they had discussed the case; none admitted to having formed an opinion of guilt or innocence as a result. ***Ibid.***

¶15 ***Resko*** recognized that the general rule governing a defendant's entitlement to a new trial because of juror misconduct requires that the defendant show that he or she was prejudiced by that misconduct, and that, ordinarily, whether a defendant has been prejudiced by juror misconduct is a matter within the trial court's discretion. ***Id.***, 3 F.3d at 690. The paucity of the trial court's inquiry, however, led ***Resko*** to conclude that the trial court's determination that the "no" answers meant that the defendants were not prejudiced by the misconduct was unsupported by fact, and that a new trial was necessary. ***Id.***, 3 F.3d at 694.

¶16 We reach the same conclusion here. Simply put, the trial court should not have accepted at face value Tischer's ultimate and reluctant concession, after he repeatedly lied, that he had a few passing and inconsequential words with Skwierawski. An evidentiary hearing at which both Skwierawski and Tischer testified under oath might have led the trial court to conclude that Tischer's partiality was compromised and, as a result, the trial court could have replaced Tischer with the alternate juror. On the other hand, a hearing might have led the trial court to conclude on a fully developed record that Tischer's words with Skwierawski were essentially of *de minimis* significance. But, as noted earlier, neither we nor the trial court will ever know.

¶17 The "right to be tried by an impartial jury of his or her fellow citizens is the cornerstone of our system of justice." ***Messelt***, 185 Wis. 2d at 263, 518 N.W.2d at 236. Unfortunately, the record made by the trial court prevented assurance to all—society as well as Albert—that the cornerstone in this case was set square. Accordingly, the trial court's determination that Albert suffered no prejudice because of Tischer's discussion with Skwierawski is not supported by facts in the record, just as the trial court's determination that the defendants in ***Resko*** suffered no prejudice because of the juror misconduct in that case was not supported by facts in the record. Accordingly, because a retrospective hearing at this late date is not practicable, *see* ***Resko***, 3 F.3d at 695 (deciding not to remand for an evidentiary hearing because, among other considerations, more than one year has passed since the trial), we have to reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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