COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP2232-CR
2012AP2233-CR

Cir. Ct. Nos. 2010CF146
2010CF577

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH R. BAILEY,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Keith Bailey appeals from judgments convicting him of two counts of first-degree sexual assault and an order denying his postconviction motion seeking a new trial. On appeal, Bailey argues that he should receive a new trial because two jurors were biased and the

State made an improper closing argument. We see no error, and we affirm the judgments and order.

¶2 The criminal complaints charged Bailey and a co-defendant, Eddie Walker, a/k/a "Memphis," with first-degree sexual assault of two women on two separate occasions. During voir dire, juror M.P. identified herself as someone with a connection to a sexual assault victim. M.P.'s son-in-law had sexually assaulted a friend of her grandson. M.P. acknowledged that Bailey's case was different from the case of her son-in-law, M.P. thought she could decide Bailey's case solely on the evidence presented, she thought she could be fair, and her bad feelings were specific to her son-in-law, not to the crime for which he was convicted. Bailey's trial counsel asked M.P., "[Y]ou believe you can sit and listen to testimony from different sources and separate that from sounds like the visceral feeling that you have for your son-in-law?" M.P. responded, "Yeah, I think so. Yes."

¶3 The court also examined juror L.W., who related that she was sexually assaulted in 2001 by someone whom she knew. L.W. was not asked any questions about whether she could be an impartial and fair juror in light of her personal experience.

¶4 Postconviction, Bailey argued that M.P. and L.W. should have been removed from the jury panel due to bias. The circuit court denied the motion, finding that the voir dire was thorough and fair. Juror M.P. clearly answered that she could be fair in her consideration of the case, and Juror L.W., who was a sexual assault victim ten years prior, stated that she understood the difference between her case and Bailey's, and she did not indicate any type of bias during

voir dire. The court found no evidence of bias in the two jurors' answers, conduct or demeanor, and no evidence of subjective or objective bias.[1]

¶5 Prospective jurors are presumed to be impartial, and the party challenging a juror bears the burden to prove bias. ***State v. Smith***, 2006 WI 74, ¶19, 291 Wis. 2d 569, 716 N.W.2d 482. "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999).

¶6 Bailey argues that M.P. and L.W. were objectively and subjectively biased. *See* ***id.*** at 716. Objective bias addresses "whether the reasonable person in the individual prospective juror's position could be impartial" after considering "the facts and circumstances surrounding the voir dire and the facts involved in the case." ***Id.*** at 718. Exclusion for objective bias requires a showing of a "direct or personal connection" between the juror and an important aspect of the case. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶19, 232 Wis. 2d 138, 606 N.W.2d 196 (1999). We will reverse the circuit court's determination regarding objective bias only if a reasonable judge could not have reached the same conclusion. ***Faucher***, 227 Wis. 2d at 720-21.

¶7 Subjective bias refers to "bias that is revealed through the words and demeanor of the prospective juror." ***Id.*** at 717. "[W]hether a prospective juror is subjectively biased turns on his or her responses on *voir dire* and a circuit court's

[1] We note that the circuit court reached the merits of Bailey's juror bias claims even though trial counsel did not object to these jurors. Postconviction counsel did not preserve trial counsel's testimony regarding his failure to object as required for an ineffective assistance of counsel claim. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Because the circuit court reached the merits of the juror bias claims, we will as well.

assessment of the individual's honesty and credibility, among other relevant factors." ***Id.*** at 718. Because the circuit court is in a superior position to assess demeanor and credibility, we will affirm the circuit court's findings of fact regarding subjective bias unless the findings are clearly erroneous. ***Id.***

¶8 With regard to M.P., the circuit court found that she could fairly consider Bailey's case. The circuit court's finding is not clearly erroneous based on the record. M.P. understood that Bailey's case was different from the case of which she had personal knowledge, M.P. thought she could decide Bailey's case solely on the evidence presented, she thought she could be fair, and her bad feelings were specific to her son-in-law, not to the sexual assault for which he was convicted. Bailey's trial counsel asked M.P., "[Y]ou believe you can sit and listen to testimony from different sources and separate that from sounds like the visceral feeling that you have for your son-in-law?" M.P. responded, "Yeah, I think so. Yes." There is no indication in this record that M.P. was either objectively or subjectively biased.

¶9 With regard to L.W., who was a sexual assault victim ten years before Bailey's trial, the circuit court found that she understood the difference between her case and Bailey's, and she did not manifest any type of bias during voir dire. Bailey argues that L.W.'s bias should be presumed because neither trial counsel nor the circuit court explored her potential bias in light of her personal experience as a victim of sexual assault. We decline to presume bias; rather, it is impartiality that is presumed. ***Smith***, 291 Wis. 2d 569, ¶19. The postconviction record is undeveloped on the question of why trial counsel did not challenge L.W. or question her further about her ability to sit on the case in light of her personal

history.[2] We are bound by the record created in the circuit court. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Our role is to correct errors the circuit court made, not to rule on matters it never considered. ***State v. Hanna***, 163 Wis. 2d 193, 201, 471 N.W.2d 238 (Ct. App. 1991).

¶10 Bailey urges upon us the independent duty of the circuit court, as part of protecting a defendant's due process right to a fair trial, to inquire when the court becomes aware of a possible source of juror bias (L.W.'s personal history). In so arguing, Bailey relies heavily upon ***Oswald v. Bertrand***, 374 F.3d 475 (7th Cir. 2004). ***Oswald*** is distinguishable on its facts. In ***Oswald***, there was evidence that the prospective jurors had been discussing the case among themselves during the lengthy jury selection process, many of them had been exposed to pretrial publicity, and some undetermined number of them may have made up their minds about Oswald's guilt before hearing evidence in the case. ***Id.*** at 479-80. Under those circumstances, the court held that the Wisconsin circuit court had a duty to inquire regarding juror bias to safeguard the integrity of the trial. ***Id.*** at 481.

¶11 Bailey's trial bore none of the troubling features of Oswald's trial. Although L.W. was not questioned about the impact of her personal history on her ability to judge the case, she did not identify herself as a person would be unable to be an impartial juror when the State posed the question to the entire venire. Furthermore, in response to an inquiry from defense counsel about whether a

[2] Bailey argues that the circuit court should have held a ***Machner*** hearing and taken trial counsel's testimony to discover why trial counsel did not question L.W. about whether she could be an impartial juror. Trial counsel was present at the postconviction motion hearing, but after the State suggested that counsel's testimony was not needed, the circuit court proceeded to decide Bailey's juror bias claims on the merits. Postconviction counsel did not object or ask the circuit court to preserve trial counsel's testimony.

prospective juror would require physical evidence such as DNA in order to reach a verdict, L.W. offered that "[t]here'd have to be pretty good evidence or something. I mean, that's – It's a serious charge that's going to affect his life for the rest of it." L.W. recognized the significance of the proceeding for Bailey. Finally, we note that a sexual assault victim is not automatically precluded from serving as a juror in a sexual assault trial. ***State v. Erickson***, 227 Wis. 2d 758, 777, 596 N.W.2d 749 (1999). There is nothing in the record before us to suggest that L.W. could not serve as an impartial juror.

¶12 We turn to Bailey's request for a new trial due to the prosecutor's allegedly improper closing argument. Bailey argued that the prosecutor suggested during closing that Bailey had conceded that a sexual assault occurred or that his co-defendant, Memphis, participated in the crime. The circuit court did not agree with Bailey's take on the prosecutor's closing argument. Rather, in the court's view, the prosecutor was arguing that during the course of the investigation, Bailey had not been truthful about the extent of his relationship with Memphis.

¶13 Trial counsel did not object to the prosecutor's remarks. We may, however, review the remarks under the doctrine of plain error. ***State v. Mayo***, 2007 WI 78, ¶¶29, 42, 301 Wis. 2d 642, 734 N.W.2d 115. We review the prosecutor's remarks in context. ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992).

¶14 The prosecutor began his closing argument with comments about Bailey's credibility in a police interview:

> Here's one thing we know for sure. This defendant lied in that interview room. Why would he lie to two detectives investigating sexual assault charges against him? Not just for the fun of it. He lied because the truth was dangerous to him.

> . . .
>
> What did the defendant lie about? A man named Memphis, the codefendant. He lied about how well he knew Memphis, how long he'd known him, where the man lived. Why did the defendant say Memphis was from Chicago? Because if Memphis was from Chicago and the detectives didn't know his real name, then they wouldn't find him and this defendant did not want the detectives to find Memphis.
>
> He wanted to throw them off Memphis' trail. Why? Because if the detectives talked to Memphis and Memphis might talk and that would be dangerous for this defendant. Memphis might sell him out or Memphis might give a story that did not jibe with this defendant's story and either one of those possibilities was dangerous for this defendant. So this defendant lied about Memphis so that the detectives would not find him because Memphis could be dangerous to this defendant.

Trial counsel responded:

> There's ample evidence for you to conclude that he [Bailey] knew Memphis longer than he said he did. However, the fact that he knew Memphis longer than he said he did, to assume he's doing that because he's trying to protect himself, that's conjecture. What's the opposite of that? He's protecting Memphis for some reason. Okay?

Trial counsel continued:

> Now, I know, because there's some things that Mr. Bailey wasn't honest about … that he knew Memphis. Okay? But just because he's lying about his friend doesn't mean it's because he's afraid his friend is going to roll over on him. It just makes just as much sense of not wanting to get your friend in trouble. You're trying to protect somebody close to you.

In his rebuttal, the prosecutor responded to trial counsel's argument:

> This defendant again and again and again is questioned about his relationship with Memphis. And there's no mistake there. It's crystal clear what's being asked and it's crystal clear from the testimony, and his attorney admits he lied, he lied about that. Mr. Jensen used the word "conjecture" quite a bit….

> . . .
>
> When Mr. Jensen says that it's mere conjecture for me to say that Memphis was lying to protect himself, I dispute that. That's not conjecture. That's common sense. People lie for a reason. If he was lying to protect Memphis, if he was innocent, why did these two women say he assaulted them also? *If he is essentially conceding that Memphis committed a sexual assault but not this defendant,* which would be the reason to protect Memphis, then why does [the victim] say that both men were involved? It come[s] back to motives. It continues to come back to motives. [Emphasis added.]

¶15 Bailey focuses on the prosecutor's remark: "If he is essentially conceding that Memphis committed a sexual assault but not this defendant…." We agree with the circuit court that the prosecutor's remark did not suggest that Bailey had conceded a sexual assault occurred or that Memphis participated in it. Rather, we agree with the circuit court that in context, the prosecutor was arguing that during the course of the investigation, Bailey had not been truthful about the extent of his relationship with Memphis. The prosecutor's remarks did not so infect "the trial with unfairness as to make the resulting conviction a denial of due process." ***Mayo***, 301 Wis. 2d 642, ¶43 (citations omitted).

¶16 To the circuit court's analysis, we add that a lawyer may argue that the evidence supports various inferences. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (counsel is afforded "considerable latitude" in arguing inferences from the evidence during closing arguments). Both Bailey and the prosecutor argued that evidence that Bailey had not been truthful about the extent of his relationship with Memphis supported an inference favorable to the side making the argument. Bailey argued that he was trying to protect Memphis; the State argued that Bailey was trying to keep Memphis at a distance because Memphis had information that would be prejudicial to Bailey's case. This was the context of the remarks. The prosecutor's argument was not improper.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).