COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP860-CR **Cir. Ct. No. 2016CT153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRAD L. CONGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Brad Conger appeals from his judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(PAC). Conger asserts the trial court erred in declining to strike a juror, Suzanne B., for cause from the jury panel. We conclude the court did not err and affirm.

Background

¶2 Conger was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and with a PAC. A jury trial was held on the charges. During jury selection, it was noted that several of the potential jurors, including Suzanne, had served the prior week as jurors for a similar OWI/PAC trial involving the same defense counsel but a different defendant. That earlier jury ultimately found that defendant not guilty of the OWI charge but guilty of the PAC charge.

¶3 For Conger's trial, the trial court queried potential jurors about their prior experience with OWI cases and subsequently conducted individualized voir dire with those jurors, including Suzanne, who had served as jurors on the OWI/PAC trial the week prior. After the individualized voir dire of Suzanne, Conger's counsel moved to strike her for cause on the ground of bias, which motion the court denied. Later, the parties made three peremptory challenges each, and neither Conger nor the State struck Suzanne; as a result, she served on Conger's jury. Conger's jury ultimately acquitted him of the OWI charge but convicted him of the PAC charge. He appeals the judgment of conviction and the trial court's decision not to strike Suzanne for cause.

Discussion

¶4 Conger insists Suzanne was biased and should have been struck for cause. We disagree.

¶5 "As a general principle, a criminal defendant has a right to a fair trial by a panel of impartial jurors." ***State v. Jimmie R.R.***, 2000 WI App 5, ¶14, 232 Wis. 2d 138, 606 N.W.2d 196 (1999). An impartial juror is one that is "indifferent and capable of basing his or her verdict upon the evidence developed at trial." ***State v. Lepsch***, 2017 WI 27, ¶21, 374 Wis. 2d 98, 892 N.W.2d 682 (citing ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999)). We presume prospective jurors to be impartial. ***State v. Funk***, 2011 WI 62, ¶31, 335 Wis. 2d 369, 799 N.W.2d 421. "The party challenging a juror's impartiality bears the burden of rebutting this presumption and proving bias." ***Id.*** In assessing bias, we are to "defer to the trial court's better position to assess the prospective juror's credibility and honesty." ***Jimmie R.R.***, 232 Wis. 2d 138, ¶30.

¶6 Wisconsin courts recognize three types of juror bias: (1) statutory bias, (2) subjective bias, and (3) objective bias. ***Faucher***, 227 Wis. 2d at 716. Conger contends Suzanne was both subjectively and objectively biased.

¶7 A juror's subjective bias "is revealed through the words and the demeanor of the prospective juror." ***Id.*** at 717. To determine if a juror exhibited subjective bias, we must inquire as to "whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge" he or she might have. ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). We have stated:

> [I]t is clear that "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." It is not just the juror's words that are important. The manner in which the juror says the words and the body language he or she exhibits while answering speak volumes—volumes that are not transmitted to a reviewing court via the cold record. Our inability to review demeanor and thus assess sincerity is precisely why we leave the determination of subjective bias to the circuit court. Thus, when reviewing a circuit court's decision on

> subjective bias, we do not focus on particular, isolated words the juror used. Rather, we look at the record as a whole, using a very deferential lens, to determine if it supports the circuit court's conclusion.

State v. Oswald, 232 Wis. 2d 103, 112, 606 N.W.2d 238 (Ct. App. 1999) (citations omitted). We "will uphold the circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous." ***Faucher***, 227 Wis. 2d at 718.

¶8 "[E]xclusion of a juror for objective bias requires a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case to be tried or the juror's intractable negative attitude toward the justice system in general." ***Oswald***, 232 Wis. 2d at 113. A juror is objectively biased if a reasonable person in the juror's position could not set aside his or her prior opinion or knowledge and be impartial. ***Faucher***, 227 Wis. 2d at 718-19. Objective bias presents a mixed question of fact and law. ***Funk***, 335 Wis. 2d 369, ¶30. "[A] circuit court's findings regarding the facts and circumstances surrounding *voir dire* and the case will be upheld unless they are clearly erroneous. Whether those facts fulfill the legal standard of objective bias is a question of law." ***Id.*** (quoting ***Faucher***, 227 Wis. 2d at 720). "[W]e will reverse a circuit court's determination in regard to objective bias 'only if as a matter of law a reasonable judge could not have reached such a conclusion.'" ***Funk***, 335 Wis. 2d 369, ¶30 (quoting ***Faucher***, 227 Wis. 2d at 720-21).

¶9 Conger states that with the verdict in the case the week prior, those jurors, including Suzanne, "rejected the blood alcohol curve defense, finding defendant not guilty of the OWI charge, but guilty of the PAC charge." Conger argues that "[w]hen questioned regarding her ability to decide Mr. Conger's case on the facts only in his case, [Suzanne] did not say yes she could, she equivocated

and said she would try to do 'the best [she] can without considering what happened last week.'" Because she "did not express a sincere willingness to set aside her prior knowledge and opinion that she had from her previous jury service," Conger continues, "she was subjectively biased, and should have been struck for cause."

¶10 Conger further contends Suzanne's answers also demonstrate objective bias because she "had already rejected virtually the same defense one week prior." "Furthermore," Conger adds, "her response to questions regarding the test result showed that she would again reject the blood alcohol curve defense" because she "specifically stated that she felt, 'if the blood went to the right place at the right time, there isn't much you can do to fight the alcohol.'" Conger insists "[h]er answer revealed her unwillingness to consider a curve defense," and "[b]ased on these answers it is apparent that a reasonable person in [the juror's] position could not have been fair and impartial."

¶11 To begin, Conger bases his entire appeal upon his assertion that the jury trial the week prior to his own trial had facts "very similar" to those in his trial, a "similar theory of defense," and the same defense counsel, who is also Conger's counsel on appeal. His appeal fails right out of the gate because by failing to provide us with any evidence related to the facts and theory of defense presented in the earlier trial, he has afforded us no way of determining the extent to which the trials are supposedly "similar."

¶12 Based upon the particular nature of this appeal, we see no way Conger can meet his appellate burden without evidence related to the facts and theory of defense actually presented to the jurors, including Suzanne, in that prior trial. The transcript from *Conger's* trial indicates that the trial judge presiding

over his trial was not the same judge who presided over the trial the week prior.[2] Before the trial court and us on appeal, the State has disputed the extent to which the facts and theory of defense in Conger's trial were "similar" to those in the trial the week prior. So, on what basis was the trial court or are we to determine that the facts and theory of defense in the prior trial were so similar to those that would be presented in Conger's trial that Suzanne should have been barred from sitting on his jury? Solely based upon the *arguments* of Conger's counsel, which were and are disputed by counsel for the State?[3] Conger has provided us with no record from which we can determine how similar the facts and theory of defense of his trial were to those of the trial the week before. Of note, the trial court's ultimate finding, as best it could make one, as to the proposed similarity between the facts of the prior trial and those proposed to be introduced in Conger's trial was that "the facts in this case are different from the facts last week, as I understand them, because we had a lot more testimony for the analyst to calculate actual absorption based upon what was consumed and when consumption stopped. I don't know as though we'll have that [in this case]."

¶13 All that said, we nonetheless consider what the trial court did have to work with, and we see no error. Even if we presume significant similarity between the two trials as to the facts and theory of defense, this does not by itself require Suzanne's removal for cause. *See* ***Kiernan***, 227 Wis. 2d at 748

[2] The trial court stated: "I'm not familiar with the previous case that you are referring to. That happened a week ago or so."

[3] We recognize that Conger's trial counsel very likely learned of the identities of potential jurors for Conger's trial near the start of the trial and thus realistically would not have had time before the start of voir dire to secure a transcript of the trial from the prior week. That said, there was no effort made to seek a continuance to procure a transcript, and Conger presented no *evidence*, from his trial counsel or otherwise, regarding the similarities between the trials.

("[V]eteran jurors need not be removed for cause when called to decide multiple cases with similar issues and identical witnesses."). Rather, "circuit courts are obligated to remove for cause *only* those jurors who are indeed biased." ***Id.*** at 749 n.9 (emphasis added).

¶14 The following discussion occurred during voir dire in open court.

> THE COURT: Has anyone either personally or had a family member or someone close to them been involved in a case regarding an operating while intoxicated charge? Oh, my. Well, let's go through.
>
> Jill, who was it that was involved?

Prospective juror Jill K. responded, "Myself," and the court questioned her for potential bias. The court then turned to prospective juror Randall H. and asked, "And who was it that was involved?" Randall H. responded, "Me." The court questioned Randall H. for potential bias, ultimately struck him for cause, and replaced him with a new prospective juror. After brief questioning of the new prospective juror, the court continued:

> THE COURT: … Who else had someone that was related to an OWI offense? Suzanne.

> PROSPECTIVE JUROR [Suzanne B.]:[4] Uh-huh.
>
> THE COURT: Who was it in your family?
>
> [SUZANNE]: Myself.
>
> THE COURT: Yourself. All right. And having had that experience, do you believe that you could sit as a juror in a case involving an operating while intoxicated charge to be fair and not biased or prejudiced, to listen to the testimony, to make a decision based solely on the testimony without any other prejudices, and to listen to the instructions as given by the Court? Do you believe you could do that?
>
> [SUZANNE]: Yes.
>
> THE COURT: All right. Fair enough. Thank you.

¶15 During individualized voir dire outside of the courtroom, relevant discussion with Suzanne related to her service as a juror the prior week went as follows:

> THE COURT: [T]he reason we wanted to talk to you privately is because you sat on the jury last week. [Conger's counsel] was [also] the attorney on the jury last week. It was an OWI case. Very similar to the case that we have today, similar in terms of the blood alcohol level, similar in terms of the kind of arguments that [defense counsel] is going to be making about the effect or appropriateness of those test results.

[4] With regard to Suzanne's responses related to her own OWI experience, the trial transcript mistakenly identifies her for this half of a page as "Prospective Juror [Jill K.]" The transcript error is made clear because, as noted, the circuit court engaged "Prospective Juror [Jill K.]" and finished its inquiry regarding the same questioning of her one page earlier in the transcript. Furthermore, the transcript only identifies one prospective juror as having the first name of "Suzanne," which is the name the court used immediately before the personal-OWI-experience response was provided by "Prospective Juror [K.]," who was really Suzanne B. Additionally, during individualized voir dire held outside of the courtroom, the prosecutor states to Suzanne: "You mentioned that you have been through prior OWIs. I know you talked about it *in there*." (Emphasis added.) A review of the transcript shows that the only time prior to this "in there" reference when it could have been Suzanne "talk[ing] [in the courtroom] about" "hav[ing] been through prior OWIs" was immediately following the court's question/statement: "Who else had someone that was related to an OWI offense? Suzanne."

So the question that I want to ask you is, do you feel that you can listen to similar kind of arguments and the specific facts in this case, which will be different from the last case, and make a decision based solely on what you hear today and not based upon, well, we decided in the last case this was the way it was so that's what I am requesting to do this time.

[SUZANNE]: That certainly can't be that way—this is very serious charges [sic]. I have been through this myself. It's not—it's horrible, horrible.

THE COURT: So do you believe that you could listen to the testimony and not be swayed by what happened last week and give both [defense counsel] and … [the prosecutor] the ability to make their arguments and listen carefully to their arguments?

[SUZANNE]: I will do my best.

….

[PROSECUTOR]: You mentioned that you have been through prior OWIs. I know you talked about it in there. But given that, do you feel you can provide the State and the defendant with kind of a fair and open mind with this case?

[SUZANNE]: I have to be because I knew I did wrong. But there is situations [sic], and I think I considered that last week, and I will certainly do that today.

….

[DEFENSE]: Do you think, based on your last service, that the instructions that were given to you you could follow those instructions again if they are the same instructions?

[SUZANNE]: Certainly.

[DEFENSE]: … [I]n the last case the jury found him not guilty of the OWI and guilty of being over the legal limit. Is it … your thought that the test is the test in terms of a PAC? If the test is over the legal limit that's enough?

[SUZANNE]: If the blood went to the right place at the right time, there isn't much you can do to fight the alcohol.

[DEFENSE]: Do you think that if the Court instructs you that they have to establish the alcohol concentration at the time of driving, do you think that the test is the test even if it's taken an hour or hour and a half after driving?

[SUZANNE]: Well, they went through all that procedure last week. There was a lot I learned from that, the peak, the up and down, and did she eat something—did they eat something. That could reflect on it too.

[DEFENSE]: Sure.

[Suzanne]: And the medicine. I know I have a couple pills that three throw it up a little bit; so—

….

THE COURT: … I think what I would be concerned about is, can you listen to this curve defense theory? I know that last week you had certain information and you had a blood test. This week it will be different from that. It's an Intoximeter test, a breath test.

[SUZANNE]: So it's right there.

THE COURT: Instead of a blood test. But the similar kinds of arguments are going to be made about the actual difference between when the person was driving and when the test occurred, the dissipation and/or absorption of alcohol into the bloodstream, all of those factors. Do you think you can consider all of those factors all new in this case based upon the facts you hear in this case without just saying, well, you heard all of this last week, and I'm going to make my decision like I did last week? That's, I guess, essentially, what we are asking you today.

[SUZANNE]: Again, I will try to do the best I can without considering what happened last week.

THE COURT: Okay.

[SUZANNE]: Well, there is different cases [sic], but I'll do the best I can.

….

[DEFENSE]: You rejected absorption/elimination, the jury did, and that's fine…. Would you reject it here simply because of what you learned from the last point? The test should be the test.

> [SUZANNE]: This case is different.
>
> ….
>
> [STATE]: [Defense counsel] was asking you about the alcohol curve test. Do you remember some testimony about that from the last time?
>
> [SUZANNE]: Yes, I do.
>
> [STATE]: And if you heard some different information about the alcohol curve in this trial, that would be a different result than the last trial. Would that be a fair statement?
>
> [SUZANNE]: It wouldn't affect my decision if that's what you mean. I guess I don't—
>
> [STATE]: You had mentioned somebody eating food.
>
> [SUZANNE]: If there was food involved.
>
> [STATE]: If you heard other foods—and other facts involved that—would that influence you in rendering a verdict?
>
> [SUZANNE]: I would take that into consideration.

¶16 Following this discussion, counsel for Conger argued that "[Suzanne] … said the test is the test" and moved that she "be struck for cause." The trial court denied the motion, explaining as follows:

> [Suzanne] was asked whether she felt she would be compelled to make a similar decision [as in the jury trial the week before], and my impression is that she did not feel that she would make a similar decision, that she would listen to the testimony, that it was a different test…. [M]y recollection is that she said the test is the test but understood that there was a difference between the time the test was taken and the time someone drove. There were influences on the test result based upon what somebody ate and the absorption rate.
>
> …. [H]er demeanor was one of openness. She was not defensive. She indicated that she would listen to all of the testimony. I would be concerned about a juror who would say, look, we have been through this already, and I understand how this works and last week we found

> somebody guilty because I … didn't believe in all of this business about absorption and time and whatever. She didn't say any of those sorts of things.
>
> I think that the facts in this case are different from the facts last week, as I understand them, because we had a lot more testimony for the analyst to calculate actual absorption based upon what was consumed and when consumption stopped. I don't know as though we'll have that. But I think that we will have testimony as best the witnesses can generate it.
>
> … I believe that she is willing to consider all of the testimony and that she is willing to listen to arguments about absorption and consumption of foods.

¶17 We read Suzanne's voir dire responses as being much more in line with the trial court's reading of them than with Conger's. Although Suzanne did make the comments Conger highlights—that she would "try to do the best [she could] without considering what happened last week" and "[i]f the blood went to the right place at the right time, there isn't much you can do to fight the alcohol," those do not indicate she was biased.

¶18 As to the first comment, the trial court had queried Suzanne:

> [S]imilar kinds of arguments are going to be made about the actual difference between when the person was driving and when the test occurred, the dissipation and/or absorption of alcohol into the bloodstream, all of those factors. Do you think you can consider all of those factors all new in this case based upon the facts you hear in this case without just saying, well, you heard all of this last week, and I'm going to make my decision like I did last week? That's, I guess, essentially, what we are asking you today.

Suzanne responded, "Again, I will try to do the best I can without considering what happened last week."

¶19 Conger appears to assume Suzanne's response meant essentially that she would "try to do the best [she] can [to not] consider[] what happened last

week." Her response sounds more to us, however, as if she was stating she would "try to do the best [she] can" in considering the facts and arguments in Conger's case and "without considering what happened last week." Either reading of her testimony here would be sensible. Our reading, however, is consistent with the finding of the trial court that Suzanne was not biased and with its specific findings that Suzanne "did not feel that she would make a similar decision," "that she would listen to the testimony," "that it was a different test," that Suzanne was "willing to consider all of the testimony and … listen to arguments about absorption and consumption of foods," and that Suzanne did not say anything like "we have been through this already, and I understand how this works and last week we found somebody guilty because I … didn't believe in all of this business about absorption and time and whatever." *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993) ("When a trial court does not expressly make a finding necessary to support its legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision."). Furthermore, even if we did read Suzanne's "I will try to do the best I can" comment in the manner Conger suggests, the comment does not convince us the trial court erred in concluding she was not biased, for, as we have previously stated, "a prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality." *See* ***Oswald***, 232 Wis. 2d at 112 (citation omitted).

¶20 Suzanne's second comment highlighted by Conger—that "if the blood went to the right place at the right time, there isn't much you can do to fight the alcohol"—also does not trouble us. To begin, the trial court identified during its questioning of Suzanne shortly after Suzanne made this comment that Conger's case involved "an Intoximeter test, a *breath* test," not a blood test. (Emphasis

added.) Suzanne recognized the difference between a blood test, as was apparently at issue in the trial the prior week, and the breath test at issue in Conger's trial, as she immediately responded to the court, "So it's right there." The transcript of Conger's trial shows that indeed it was a breath test utilized in his trial, not a blood test. With that, any possible concern about Suzanne's reference to the "blood test" going "to the right place at the right time" dissipates, because she provided no opinion as to the test relevant in Conger's trial, the Intoximeter/breath test.

¶21 More importantly, however, the totality of Suzanne's comments demonstrate the trial court correctly determined Suzanne had neither subjective nor objective bias. When the court asked Suzanne if she could "sit as a juror in a case involving an [OWI] charge to be fair and not biased or prejudiced, to listen to the testimony, to make a decision based solely on the testimony without any other prejudices, and to listen to the instructions as given by the Court," she answered, "Yes." When the court inquired into whether she might have the mindset of "well, we decided in the last case this was the way it was so that's what I am requesting to do this time," Suzanne responded, "That certainly can't be the way—this is very serious charges [sic]. I have been through this myself…. [I]t's horrible, horrible." When the court asked, "[D]o you believe that you could listen to the testimony and not be swayed by what happened last week and give both [defense counsel] and … [the prosecutor] the ability to make their arguments and listen carefully to their arguments," she indicated she would "do [her] best." When Conger's counsel asked Suzanne, "Do you think, based on your last [jury] service, that the instructions that were given to you you could follow those instructions again if they are the same instructions," Suzanne responded, "Certainly."

¶22 Suzanne clearly expressed her understanding that each case stood on its own facts and that Conger's case would not be the same as the earlier case on which she served as a juror. When Conger's counsel asked her, "Do you think that if the Court instructs you that they have to establish the alcohol concentration at the time of driving, do you think that the test is the test even if it's taken an hour or hour and a half after driving," Suzanne responded, "Well, they went through all that procedure last week. There was a lot I learned from that, the peak, the up and down, and … did they eat something. *That could reflect on it too*.… And the medicine." (Emphasis added.) Most pointedly, when Conger's counsel asked Suzanne, "You rejected absorption/elimination, the jury did, and that's fine…. Would you reject it here simply because of what you learned from the last point? The test should be the test," she responded, "This case is different."

¶23 Suzanne exhibited no subjective bias, and the trial court correctly determined so. There was no objective bias either. Again, Conger provides us with no actual *evidence* related to the facts and theory of defense presented to the jury in the earlier trial; however, in light of the record before us, it seems to us a reasonable person in Suzanne's position would easily be able to be impartial sitting as a juror in Conger's trial. There was no "direct, critical, [or] personal connection" between Suzanne "and crucial evidence or a dispositive issue" in Conger's case, nor did she have an "intractable negative attitude toward the justice system in general." *See* ***Oswald***, 232 Wis. 2d at 113.

¶24 The trial court did not err in determining that Suzanne was not biased and in rejecting Conger's motion to strike her for cause.

By the Court.—Judgment affirmed.

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