COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3489-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORY T. BAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Cory T. Baker appeals from a judgment of conviction for attempted first-degree intentional homicide, first-degree reckless injury, second-degree recklessly endangering safety and seven counts of first-

degree recklessly endangering safety.[1] He argues that the trial court's refusal to remove a juror for cause deprived him of the full benefit of peremptory challenges, that the evidence was insufficient to support the recklessly endangering safety convictions and that he was denied a fair trial by commentary in the prosecutor's closing argument that he had the ability to subpoena witnesses. We conclude that there is no error warranting reversal of the judgment or a new trial. We affirm the judgment.

¶2 Baker was charged as a result of a confrontation at the Racine home of Robert and Phyllis White on September 16, 1997. Baker and several others went to the Whites' home. A struggle on the porch took place and shots were fired at Robert. Robert was wounded in the abdominal area. Shots were also fired at Robert's stepson and brother-in-law and in the direction of the White home, which was then occupied by Phyllis and several family members.

¶3 Baker was tried with codefendant Tai Minor.[2] Each defendant was allowed three peremptory challenges to jurors. During jury selection, potential juror Paul D. expressed knowledge and feelings he had about an unrelated shooting of a delivery person in Racine. Paul had a business relationship with the victim of that homicide. Outside the presence of other potential jurors, the trial court questioned Paul about his ability to be fair and impartial. Paul expressed that he did not think there was anything that would affect his ability to be fair and impartial and that he would try his best to just look at the evidence presented.

[1] All the convictions were for party to the crime liability and with use of a dangerous weapon.

[2] Tai Minor's conviction for the same offenses was affirmed by summary disposition. *See* ***State v. Minor***, No. 98-3238-CR, unpublished slip op. (Wis. Ct. App. Aug. 11, 1999).

When asked by codefendant's counsel, "Now, do you feel you could be fair and impartial?", Paul responded, "Not a hundred percent." Paul indicated that he would not want someone like himself to be on a jury if his son were the accused. Baker's counsel inquired whether Paul was aware that in the delivery driver case a young African American male was arrested and that guns were involved.[3] Paul knew these facts. Paul was asked, "Do you think that would interfere at points in your ability to keep your emotions out of things?" Paul answered, "I believe it could." The trial court asked one final question, "Again, your answer is that your decision in this case if you are picked here would be based on the facts of this case and the law as given to you by the Judge and not based on what happened in another crime, is that correct?" Paul answered, "Yes, I'd try, yes."

¶4 Both defendants moved to remove Paul from the jury panel for cause. The request was denied. The trial court ruled that Paul was "upset by another matter that is totally unrelated to this … but it's clear I think he will decide the case based on the evidence and law as given." Baker used one of his peremptory challenges to remove Paul from the jury. He now argues that he was denied the benefit of his peremptory strikes because he had to use one to remove a juror who should have been removed for cause. *See* ***State v. Ramos***, 211 Wis. 2d 12, 24-25, 564 N.W.2d 328 (1997); ***State v. Kiernan***, 221 Wis. 2d 126, 137, 584 N.W.2d 203 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 736, 596 N.W.2d 760 (1999).

¶5 In ***State v. James H. Oswald***, 2000 WI App 3, ¶4, Nos. 97-1219-CR, 97-1899-CR, this court had an opportunity to integrate four recent supreme court

[3] Counsel acknowledged that Baker is also a young African American male.

decisions discussing all aspects of juror bias.[4] Those cases clarified the state of juror bias jurisprudence in Wisconsin by adopting the terms "statutory," "subjective" and "objective" bias. *See* ***id.*** "Subjective bias refers to the prospective juror's state of mind." ***Id.*** "A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." ***State v. Theodore Oswald***, 2000 WI App 2, ¶19, No. 97-1026-CR. Objective bias exists when the prospective juror's relationship to the case is such that no reasonable person in the same position could possibly be impartial even though the juror desires to set aside any bias. *See* ***James Oswald***, 2000 WI App 3 at ¶4.

¶6 Our review of a trial court's determination on both the subjective and objective bias is deferential. *See* ***id.*** at ¶5. With respect to subjective bias, the recent decisions "nail down the proposition that 'questions as to a prospective juror's sincere willingness to set aside bias should be largely left to the circuit court's discretion.'" ***Id.*** at ¶6 (quoting ***State v. Ferron***, 219 Wis. 2d 481, 501, 579 N.W.2d 654 (1998)). The trial court is charged with not only considering what the prospective juror says but also with viewing the prospective juror's manner and body language. *See* ***id.*** Thus, in reviewing the circuit court's determination of subjective bias, "we do not focus on the particular, isolated words the jury 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." ***Id.***

[4] Those cases are ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999); ***State v. Kiernan***, 227 Wis. 2d 736, 596 N.W.2d 760 (1999); ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999); ***State v. Mendoza***, 227 Wis. 2d 838, 596 N.W.2d 736 (1999).

¶7 "[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." ***Id.*** at ¶8. The deference afforded the trial court's determination of objective bias is slightly less than that applicable to a determination of subjective bias because the conclusion of whether the facts add up to objective bias is intertwined with the factual findings. *See* ***id.*** at ¶5.

¶8 Baker argues that Paul should have been removed from the jury because Paul's answers gave an appearance of bias and only said that he probably could set aside prior opinion and be impartial. *See* ***Ferron***, 219 Wis. 2d at 499. To the extent Baker is suggesting that Paul was objectively biased, we easily reject that notion.[5] None of the reservations Paul expressed with regard to his jury service had to do with the facts of this case, any witness in this case, the defendant's constitutional rights or a disdain for the criminal justice system. Paul's expressions stemmed from an unrelated incident. It was not error to refuse to strike Paul for objective bias. *See* ***James Oswald***, 2000 WI App 3 at ¶21 (jurors not objectively biased because experience as an immigration officer and familial relationship to a police officer did not create a direct, personal connection to a dispositive issue in the case); ***Theodore Oswald***, 2000 WI App 2 at ¶29-32 (jurors not objectively biased because opinions of guilt did not bear on the coercion defense strategy).

[5] The briefs in this appeal were filed before the supreme court's recent line of cases on juror selection in criminal cases and therefore did not have the opportunity to employ the terms defined in those cases. Statutory bias is not at issue here.

¶9 With respect to whether Paul was subjectively biased, we acknowledge that upon examination by the defense attorneys Paul was equivocal in his ability to decide the case without memory of the recent homicide.[6] Again, we note that Paul's misgivings related only to his reaction to an unrelated homicide. It is an unfortunate reality that not all jurors can be free from the emotional ardor created by the level of criminal activity in our communities. The critical circumstance here is that in the final moment Paul expressed that he would try to make a decision in this case based on the facts and law of this case and not on what happened in the other crime. A prospective juror need not give unequivocal assurances of his or her ability to decide the case without influences of daily life. *See* ***James Oswald***, 2000 WI App 3 at ¶19; ***Theodore Oswald***, 2000 WI App 2 at ¶24.

¶10 The trial court was in a better position to determine if Paul was sincerely willing to put aside his knowledge and opinions of the unrelated homicide. The trial court found it clear that Paul could do so. That finding is not clearly erroneous. Therefore, Paul was not subject to dismissal for cause and Baker was not denied the benefit of his peremptory strikes.

¶11 Baker challenges the sufficiency of the evidence to sustain his conviction of first-degree recklessly endangering safety as party to a crime. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of

[6] Paul's initial response to the trial court's inquiry of whether there was anything that would affect his ability to be fair and impartial was, "I don't think so. I just thought maybe I should mention that [his feelings about the unrelated homicide]."

fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶12 The State was obligated to prove that Baker was aware that his conduct created a substantial risk of death or great bodily harm to another person. *See* WIS JI—CRIMINAL 1345. Baker argues that the State failed to adduce sufficient evidence of his subjective awareness that his conduct in shooting outside the house created a risk for the individuals inside the house. He contends that there was no proof that he and his codefendant knew that there were people inside the house at the time of the shooting.

¶13 The "awareness of risk" element relates to a mental state. Direct proof of intent is rare. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 200, 316 N.W.2d 143 (Ct. App. 1982). As in most criminal cases, state of mind may be proven by circumstantial evidence. *See* ***State v. Bowden***, 93 Wis. 2d 574, 583, 288 N.W.2d 139 (1980). Thus, the State was not required to affirmatively prove that Baker knew there were people inside the house.

¶14 The evidence was that hours before the confrontation on the porch of the home, Baker and his codefendant Minor visited the home. The door was answered by Markey Canady and his fourteen-year-old and one-year-old daughters. Also, Baker had frequently stayed at the house across the street. From this the jury could reasonably infer that when Baker returned to the home in the early evening, he knew that the house was not vacant, that he was aware that it was a family home in a residential neighborhood, and that small children and others were likely to be inside.

¶15 The shooting incident occurred on the porch. A total of eight to fifteen shots were fired. The shots were fired indiscriminately; five struck the

house and at least one penetrated to the interior of the home. The indiscriminate firing demonstrates the lack of regard for the unreasonable and substantial risk of injury to anyone who might be injured by a stray bullet. We conclude that sufficient evidence was presented to permit the inference that Baker and his coactors were aware of the possible consequences of the shooting spree.

¶16 In closing argument, counsel for codefendant Minor argued: "There's the story about a young man named Hughes that was in the room where the window got hit. Was he or wasn't he? I don't know. I'd certainly like to have a chance to ask him about it." In response, the prosecutor argued in rebuttal:

> Counsel for Mr. Minor indicated that he would have liked to have been able to speak to Christopher Hughes about where he was in the house. Well, the State is not the only power in this room that has subpoena power....[7] Both counsel have the power to attempt to subpoena anybody they want and bring them in here, and if he'd wanted Mr. Hughes in here, he could have brought him in here to talk to him.

¶17 Baker claims that this argument was an improper comment on his failure to present evidence or witnesses. *See* ***State v. Patino***, 177 Wis. 2d 348, 381, 502 N.W.2d 601 (Ct. App. 1993). He further contends that it was an unfair attempt to shift the burden of proof to the defendants and therefore constituted prosecutorial misconduct entitling him to a new trial.

¶18 This claim of prosecutorial misconduct was raised and rejected in ***State v. Minor***, No. 98-3238-CR, unpublished slip op. (Wis. Ct. App. Aug. 11, 1999). There we stated that "[w]e are unpersuaded that the prosecution's comment violated the presumption of innocence." ***Id.*** at 3. We concluded that

[7] Baker's objection was overruled.

"[t]he State's rejoinder concerning Hughes entailed no improper burden shifting." ***Id.*** Our decision establishes the law of the case, which must be adhered to. *See* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis. 2d 252, 261, 500 N.W.2d 339 (Ct. App. 1993). Baker's claim is rejected.[8]

By the Court.—Judgment affirmed.

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

[8] We note that in our decision in ***Minor***, unpublished slip op. at 3, we additionally concluded that the prosecution's comment was invited and was a proper measured response. Having addressed Baker's claim on the merits, we need not decide his contention that if the error was invited by counsel for Minor, it was not invited on his behalf.