COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2079-CR **Cir. Ct. No. 2004CT251**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH E. NEU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Kenneth Neu appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense. He contends that the circuit court erroneously exercised its discretion when it

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

limited his attorney's questioning during voir dire. He also argues he was deprived of his Sixth Amendment right to confront his accusers. This court rejects Neu's arguments and affirms the judgment of conviction.

¶2 Neu first argues that the circuit court erroneously limited his attorney's questions during voir dire. The judge began voir dire by asking an array of questions, after which the parties were invited to supplement the questioning. At one point, Neu's attorney asked whether any jurors watched fictional television shows about police, lawyers, and court cases. Neu's attorney then asked a juror which shows he watched. The juror replied that he watched "all four of the Law & Order series." Once Neu's attorney began suggesting that fictional depictions of court proceedings differ from reality, the court interjected:

> THE COURT: I'm not sure how far we have to go into this.
>
> [NEU'S ATTORNEY]: Okay.
>
> THE COURT: Let me just advise you, members of the jury, that real life trials are not like television. I'm sorry to disappoint you. But they are not. So I think we've covered that subject.
>
> [NEU'S ATTORNEY]: Sure.
>
> The second type of television show I'd like to ask a question about are news dramas.
>
> THE COURT: No, I think we've covered television.

¶3 Before the jury was sworn in, Neu's attorney objected to having his questioning restricted in this manner. He asserted that he was searching for indications of objective bias and his questions were not hypothetical and were reasonably intended to reveal juror bias, and therefore, the court should not have interfered with his questioning. The court responded that while media exposure might be relevant to determining jury bias in some cases, there was a tenuous

connection between media exposure and this prosecution. The court concluded that Neu's questions were not helpful in picking a fair and impartial jury.

¶4 The United States and Wisconsin Constitutions guarantee a criminal defendant the right to an impartial jury. *See* U.S. CONST. amend. VI; WIS. CONST. art I, § 7. Control over jury examination rests primarily with the circuit court, which has broad discretion over the form and number of questions to be asked. ***State v. Koch***, 144 Wis. 2d 838, 847, 426 N.W.2d 586 (1988). This discretion is subject to the basic demands of fairness. ***Hammill v. State***, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979) (citing ***Aldridge v. United States***, 283 U.S. 308, 310 (1931)). The statute on jury qualifications and examination is WIS. STAT. § 805.08(1), which states:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based on hypothetical questions.

¶5 Our supreme court has categorized jury bias into three types: statutory bias, subjective bias, and objective bias. ***State v. Faucher***, 227 Wis. 2d 700, 706, 596 N.W.2d 770 (1999). Statutory bias applies to jurors who meet one of the criteria in WIS. STAT. § 805.08(1); for example, he or she is related to one of the parties. ***Id.*** at 717. Subjective bias is that which is revealed through the words and demeanor of the prospective juror, focusing on the juror's state of mind. ***Id.*** Objective bias focuses on how someone else would view the juror,

inquiring whether a reasonable person in the prospective juror's position could be impartial. ***Id.*** at 718.

¶6 Neu contends that his proposed questioning of jurors about television shows and "news dramas" was intended to reveal objective bias. Without the ability to pursue this questioning, Neu claims it is likely that a biased jury was seated. In support of his argument, Neu states that "[t]here are commentators in the media who make it their stated objective to influence public opinion on matters involving the courts and the criminal justice system," citing talk radio as a "good example." He also asserts that this line of questioning was particularly important because legislators seek out media coverage when "tripping over one another on the capitol steps to sponsor an amendment to [the drunk driving statutes]." This being the extent of Neu's reasoning, this court is unconvinced that his questions were reasonably calculated to discover any objective bias.

¶7 Neu fails to explain what information about a juror's media preferences might lead to a determination that the juror could not be impartial. The mere fact that a juror listens to talk radio or watches a given television show or "news drama" seems unlikely to reflect on that juror's ability to decide a case based on the evidence presented.[2] This is inherently different from a juror's exposure to media coverage of the case at hand, where the juror may have developed preconceptions about the facts of the case and the defendant's guilt.

[2] Perhaps it is conceivable that a recently aired media episode, as opposed to a series generally, could be so hauntingly dramatic and factually similar as to permit the inference that an observing juror's ability to act impartially would be affected. However, there is no indication that such a circumstance existed here or that it was the focus of Neu's inquiry.

Such media coverage could lead to an objective conclusion that the juror is unable to act impartially. Here, there is no basis for concluding that a biased jury was seated.

¶8 Neu's second claim is that his Sixth Amendment right to confront his accusers was violated. His argument is premised on the fact that no witness testified that he or she wrote Neu's identifying information on the blood analysis form that was sent with the blood sample for testing. Relying upon ***Crawford v. Washington***, 541 U.S. 36 (2004), Neu claims that his identifying information was testimonial hearsay. It was testimonial because it was part of a forensic blood kit and therefore was intended to be used as evidence in court. He contends it was hearsay because no witness testified that he or she wrote the information. He therefore claims he was unable to cross-examine the person who did so.

¶9 The testimony regarding the blood test was generally as follows. Officer Gary Axness first testified that he brought Neu to the hospital and a technician drew Neu's blood. He testified that he was present when the blood was drawn and packaged. Axness then took possession of the package, which he kept until he mailed it. The technician, Ann Buenzli, testified that she was asked by Axness to draw blood from a man identified as Neu. On cross-examination, she testified that she signed the blood analysis form, but she did not write Neu's personal information. Finally, Diane Kalscheur, a hygienist at the State Laboratory of Hygiene, testified that she received, opened, and tested blood that was labeled with Neu's identifying information.

¶10 We agree with the State's argument that there is no confrontation issue here. While Neu argues that he was denied his constitutional right to cross-examine the person who wrote his identifying information on the blood analysis

form, it is not clear that Neu was denied his right to confront anyone. Without a witness he was unable to confront, Neu has no confrontation claim. Instead, Neu's claim seems to be the result of his inconsistent cross-examination of the State's witnesses. While he ascertained that Buenzli did not write his identifying information, he did not question the other person known to be present, Axness, about whether he wrote the information. Had Neu done so, he could have determined that Axness wrote the information, or alternatively, that someone else did and that he was unable to cross-examine that person.

¶11 Without a confrontation issue, the question becomes whether the blood test results were properly authenticated. The requirements for authentication are satisfied if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. Such evidence was present here. Axness testified that he was present when Buenzli drew blood from Neu and packaged it. He also testified that he took possession of the packaged blood and mailed it. Kalscheur testified that she received a blood kit that included Neu's identifying information. Aside from Neu's identifying information, the blood analysis form lists Buenzli as the person who drew the blood and contains her signature. It also identifies Axness as the person to whom the test results should be sent. Taken together, these facts were sufficient to support a finding that the blood tested by Kalscheur was the same blood drawn by Buenzli and mailed by Axness.

By the Court.—Judgment affirmed.

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