COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1382

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

IN THE MATTER OF THE MENTAL COMMITMENT OF EDWARD F.W.,

MARATHON COUNTY,

PETITIONER-RESPONDENT,

V.

EDWARD F.W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Marathon County: PATRICK BRADY, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Edward F.W. appeals an order for mental recommitment under WIS. STAT. § 51.20(1)(am) and an order denying his motion for a new trial. Edward contends the court erred by failing to stike a juror for cause. We disagree and affirm the orders.

BACKGROUND

¶2 Edward was originally committed in 1998. At a recommitment jury trial on February 4, 2000, Edward testified. On cross-examination he was asked if he remembered grabbing and rubbing the arm of Jamie Maltbey in 1998 at the Rothschild swimming pool. After Edward's testimony, juror Warren Aschbrenner informed a bailiff that he was related to Maltbey. The court then questioned Aschbrenner and learned that Maltbey was his niece's daughter. She lived near him and had a close relationship with his son. Aschbrenner and Maltbey attended the same church. Aschbrenner said this was the first he had heard of the incident. He said it would not affect his ability to render a fair verdict. The court found as follows:

> Based upon his demeanor and his answers, I just don't find there is any reason to believe that he will not be fair and impartial, especially since the incident that was described with his niece was of such a minor nature, didn't really amount to a sexual touching, and the family apparently never had even mentioned it, so I'm going to leave the jury panel as it is.

The jury unanimously found that Edward was mentally ill, dangerous to others, and a proper subject for treatment. Edward moved for a new trial on the grounds

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d). All statutory references are to the 1997-98 edition unless otherwise noted.

that the court should have struck Aschbrenner for cause. The court denied the motion.

DISCUSSION

¶3 In ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999), the supreme court clarified the terminology to be used when examining juror bias. A juror is biased and should be removed for cause if the juror is (1) statutorily biased, (2) subjectively biased, or (3) objectively biased. *See* ***id.*** at 725-27. A juror is statutorily biased if the juror is related by blood or marriage to any party or any attorney in the case or if the juror has a financial interest in the case. *See* WIS. STAT. § 805.08(1). Edward does not contend that Aschbrenner was statutorily biased. It is not clear from his brief whether his argument focuses on subjective or objective bias. Therefore, we address each in turn.

1. Subjective Bias

¶4 Subjective bias refers to a juror's state of mind. A juror is subjectively biased if the juror is not sincerely willing to set aside any opinion or prior knowledge that the juror may have. *See* ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). Because subjective bias is most readily identified from the honesty and credibility of the juror's responses, we uphold a circuit court's factual finding that a juror is or is not subjectively biased unless the finding is clearly erroneous. *See* ***Faucher***, 227 Wis. 2d at 718.

¶5 Here, Aschbrenner assured the court that his relationship to Maltbey would not affect his ability to be fair. Further, he had never before heard anything about the incident of grabbing and rubbing Maltbey's arm. The circuit court observed Aschbrenner as he answered questions and was satisfied that he could be

fair. There is nothing in the record to suggest that the court's ruling is clearly erroneous.

2. Objective Bias

¶6 A determination of whether a juror is objectively biased focuses on whether a reasonable person in the individual juror's position could be impartial. *See* ***id.*** For example, when a prospective juror has formed an opinion or has prior knowledge, regardless of whether that juror says he or she could be fair, the circuit court must determine if a reasonable person in the juror's position could set aside the opinion or prior knowledge. *See* ***id.*** at 719. A court's conclusion on whether a juror is objectively biased is a mixed question of law and fact. *See* ***id.*** at 720. We will give weight to this conclusion during our review and will reverse only if, as a matter of law, a reasonable judge could not have reached the same conclusion. *See* ***id***. at 721.

¶7 ***State v. Lindell,*** 2000 WI App 180, is the only Wisconsin case dealing with the relationship of a juror to a victim. Lindell was convicted of first-degree intentional homicide. The circuit court had refused to remove a prospective juror who had known the victim for twenty years. The juror said the victim was a friend and she had seen him about three times a week. The victim had made beer deliveries at the juror's parents' tavern and had eaten breakfast there daily. The juror said she could be fair.

¶8 We applied a two-step analysis. First, we examined whether the juror had "a direct, critical, personal connection to crucial evidence or a dispositive issue, or has an intractable negative attitude toward the justice system in general." ***Id.*** at ¶17. There was no such showing in the record. *See* ***id.*** at ¶19.

¶9 However, that did not end the inquiry. We also recognized that "a juror's relationship to the victim may be of such a nature as to taint a reasonable juror's ability to rationally consider all the evidence …." ***Id.*** at ¶17. Therefore, as a second step, we also considered "whether the juror's relationship with the victim is so close that as a matter of law no reasonable person in the position of the juror would be 'indifferent in the case' as required by WIS. STAT. § 805.08(1)." ***Id.*** The record established that the juror was not related to the victim. *See* ***id.*** at ¶19. There was no testimony she had an exceptionally close relationship with the victim. *See* ***id.*** Therefore, we conclude that a reasonable court could have concluded that the juror was not objectively biased. *See* ***id.***

¶10 If the juror in ***Lindell*** was not objectively biased, the juror in this case certainly was not. For the first step, Edward has shown no direct connection between Aschbrenner and any crucial evidence or dispositive issue, or any negative attitude toward the justice system. In fact, Aschbrenner had never heard about the incident involving Maltbey until Edward testified. Further, as the court commented, the incident was relatively minor and did not involve any sexual touching.

¶11 As to the second step, there is no testimony that Aschbrenner had an exceptionally close personal relationship with Maltbey. Maltbey was a relative in the fourth degree. Aschbrenner's son's close relationship with Maltbey does not taint Aschbrenner, nor does the simple fact of belonging to the same church or living nearby. We are satisfied from this record that a reasonable judge could conclude that Aschbrenner's relationship with Maltbey was not so close that as a matter of law no reasonable person in Aschbrenner's position would be indifferent in the case.

¶12 Edward weaves two other assertions into his argument about juror bias. First, he observes that Aschbrenner stated during voir dire of the jury panel that his nephew is a detective for the Rothschild Police Department. Then he asserts it was error to leave Aschbrenner on the jury because of "his relationship to an officer whose employer was charged with investigating the alleged crime against his niece's daughter …." If Edward is suggesting objective bias, he once again fails the twin tests of ***Lindell***.

¶13 Second, Edward also claims error because all of the foregoing occurred in the context of "charged testimony regarding [Edward's] history of sexual deviance …." However, he makes this assertion without any reference to the record. We will not consider arguments not supported by appropriate reference to the record. *See* ***State v. Lass***, 194 Wis. 2d 591, 604, 535 N.W.2d 904 (Ct. App. 1995).

By the Court.—Orders affirmed.

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