COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1112-CR **Cir. Ct. Nos. 2001CF6430**
2002CF2768

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL D. ESPINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL BRENNAN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. A jury found Manuel D. Espino guilty of three counts of the manufacture or delivery of cocaine, between fifteen and forty grams, and one count of possession of cocaine, more than 100 grams, with intent to deliver, party to a crime. *See* WIS. STAT. §§ 961.41(1)(cm)3; 961.41(1m)(cm)5;

and 939.05 (2001-02). The issues on appeal concern the composition of the jury. We conclude that the circuit court did not err when it declined to remove juror E.S. for cause and that Espino's constitutional rights were not violated when he had to use a preemptory strike to remove E.S. from the jury panel. We further conclude that the circuit court did not err when it removed juror L.B. from the jury after L.B. informed the court that he knew two defense witnesses and had formed an opinion as to their credibility. Therefore, we affirm.

Juror E.S.

¶2 Prospective juror, E.S., was a captain in the Milwaukee Sheriff's Department who worked at the Milwaukee County Criminal Justice Facility. During *voir dire*, E.S. said that he did not believe that his job as a law enforcement officer would affect his ability to judge the credibility of other law enforcement officers. In response to questions from Espino's attorney, E.S. admitted that police officers might sometimes target minorities and that certain officers might slant or shade the truth. E.S. stated that he would treat a police officer's testimony as he would any other witness. E.S. told the court he was not scheduled to work during the week of the trial.

¶3 Espino moved to strike E.S. from the jury for cause. Espino's attorney stated that the defendant saw "a problem with [E.S.] running the jail and [Espino] being there." The circuit court refused to strike E.S. for cause. The circuit court noted that E.S. was not scheduled to work during the week of the trial, and therefore, he would not have any contact with Espino. Espino removed E.S. from the jury with a preemptory strike.

¶4 On appeal, Espino contends that the circuit court should have struck E.S. for cause because E.S. "would have knowledge, potentially, about courtroom

practices, including the manner in which the defendants are provided clothing and covered to prevent shackles or confinement from being visible." Espino also notes that E.S.'s job required that he "handle a great number of offenders, including drug offenders."

¶5 Espino concedes that a prospective juror may not be removed for cause solely because he is a law enforcement officer. *See* ***State v. Louis***, 156 Wis. 2d 470, 474, 457 N.W.2d 484, 486 (1990). He contends, however, that the "particulars" of E.S.'s employment "were peculiar and quite out of the norm," and he implicitly suggests that E.S. was objectively biased.[1] We reject Espino's contention.

¶6 When considering whether a prospective juror is objectively biased, the question is whether a reasonable person in the prospective juror's position could be impartial. ***State v. Smith***, 2006 WI 74, ¶21, 291 Wis. 2d 569, 582, 716 N.W.2d 482, 488 (citation omitted). This presents a mixed question of fact and law. ***Id.***, 2006 WI 74, ¶22, 291 Wis. 2d at 582, 716 N.W.2d at 488. The circuit court's factual findings surrounding *voir dire* will be upheld unless they are clearly erroneous; whether those facts fulfill the legal standard of objective bias is a question of law. ***Id.***, 2006 WI 74, ¶22, 291 Wis. 2d at 582-583, 716 N.W.2d at 488-489.

¶7 In this case, the circuit court found that E.S. would not be working at the jail during the trial. The court stated that it "was impressed by [E.S.'s]

[1] Espino does not argue that E.S. was subjectively biased. *See* ***State v. Smith***, 2006 WI 74, ¶20, 291 Wis. 2d 569, 581-582, 716 N.W.2d 482, 488 (Subjective bias refers to a prospective juror's state of mind as revealed during *voir dire*; if the prospective juror believes he can be impartial and fair, subjective bias does not exist.).

credibility," noting that E.S. was "quite forward and honest" when he admitted that police officers sometimes target minorities and that police officers sometimes, but not always, protect each other. The circuit court indicated that it would "specifically instruct [E.S.] that he is not to do any independent research concerning the case." The circuit court concluded that E.S. was not objectively biased.

¶8 The circuit court's findings of fact are supported by the Record. Because E.S. was not working during the trial, there was no potential for contact with Espino at the jail. There is no evidence that E.S. had any prior contact with Espino or any independent knowledge of this case. *See* ***Smith***, 2006 WI 74, ¶24, 291 Wis. 2d at 583-584, 716 N.W.2d at 489. E.S. told the circuit court and counsel that he would consider the testimony of a law enforcement officer in the same manner as he would consider the testimony of other witnesses and that he would be impartial. A prospective juror's subjective state of mind "is an important consideration in the overall determination of objective bias." ***Id.***, 2006 WI 74, ¶25, 291 Wis. 2d at 584, 716 N.W.2d at 489.

¶9 This case is similar to ***Louis***. In that case, the circuit court refused to strike for cause two prospective jurors who were Milwaukee police officers when the State's primary witness was another Milwaukee police officer whom the prospective jurors recognized. ***Louis***, 156 Wis. 2d at 474-475, 457 N.W.2d at 486. Both prospective jurors "stated unequivocally that they could independently assess the credibility of the witnesses." ***Id.***, 156 Wis. 2d at 484, 457 N.W.2d at 490. The supreme court stated that "[w]hile such expressions are not conclusive, evaluating the subjective sincerity of those expressions is a matter of the circuit court's discretion." ***Id.*** Because the Record lacked any proof that the officers were

biased, the supreme court upheld the circuit court's discretionary decision not to strike the officers for cause. ***Id.***

¶10 In this case, E.S. told the circuit court that he could be fair and impartial. The circuit court was "impressed" by E.S.'s credibility and concluded that E.S. was not objectively biased. The Record supports the circuit court's conclusion.[2]

¶11 Espino also complains that he was forced to use a peremptory strike to remove E.S. from the jury panel, and therefore, he was denied due process and equal protection. Because E.S. was not objectively biased, Espino's decision to remove E.S. from the jury was his choice, and in no way implicated his constitutional rights. Moreover, even if E.S. should have been removed for bias, "[t]he substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error." ***State v. Lindell***, 2001 WI 108, ¶113, 245 Wis. 2d 689, 747, 629 N.W.2d 223, 250; *see also* ***United States v. Martinez-Salazar***, 528 U.S. 304, 317 (2000) (A defendant's exercise of peremptory challenges under FED. RULE CRIM. PROC. 24(b) is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause.).

[2] Because police officers routinely know more about criminal proceedings than laypersons, Espino's reliance on E.S.'s presumed knowledge of courtroom practices as evidence of objective bias is little more than an argument that any police officer should be disqualified from jury service. That is not the law under ***Louis***.

Juror L.B.

¶12 L.B. was one of fourteen jurors impaneled to decide Espino's case. Although L.B. did not initially tell the circuit court that he knew Espino, after Espino's attorney mentioned in his opening statement that Espino worked for Emmpak, a local meat processor, L.B. realized that he recognized Espino from Emmpak, where L.B. also had worked for nearly twenty years. During a *voir dire* examination, L.B. told the circuit court that he only recognized Espino by face and that he had never talked with him. L.B. told the circuit court that the fact that he and Espino worked at the same place would not cause him to "lean[ ] one way or the other." Two defense witnesses also worked at Emmpak, but L.B. did not recognize their names. The circuit court told L.B. that he should let the court know if he recognized those witnesses. At that time, the court denied the State's motion to remove L.B. from the jury.

¶13 In his defense case, Espino introduced the testimony of two men who worked with him at Emmpak. After their testimony, L.B. advised the circuit court that he recognized both men and had likely had work-related conversations with them. When the circuit court asked whether L.B. had an opinion as to whether they were honest or dishonest, L.B. responded, "Pretty much, yeah, they was pretty honest … during the time we was all there together." Over Espino's objection, the court then granted the State's motion to excuse L.B.

¶14 On appeal, Espino contends that the circuit court's striking of L.B. violated his constitutional rights to due process and equal protection. "A prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification." ***Louis***, 156 Wis. 2d at 484, 457 N.W.2d at 490. Thus, L.B.'s acquaintance with the two defense

witnesses would not warrant his removal from the jury. Espino's challenge to L.B.'s removal rests on a faulty assumption. He asserts that L.B. "was not predisposed to judgment." The Record shows, however, that L.B. had formed an opinion about the credibility of two witnesses. Under those circumstances, the circuit court did not erroneously exercise its discretion when it struck L.B. from the jury.

By the Court.—Judgment affirmed.

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