

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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No. 01-0499-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD J. MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Bernard J. McCoy appeals from a judgment entered on a jury verdict finding him guilty of delivery of fewer than five grams of

cocaine, within 1,000 feet of a school, as party to a crime, contrary to WIS. STAT. §§ 961.41(1)(cm)1, 961.49(1)(b)6, and 939.05 (1999–2000).¹ He also appeals from the trial court’s order denying his motion for postconviction relief. He claims that he was denied a fair trial when the trial court engaged in an extended colloquy with prospective jurors about the negative impact of drugs on the community. We agree and reverse for a new trial. He also claims that the trial court imposed a sentence that is unduly harsh, claiming that it is based upon an improper factor and was more severe than the sentence of a co-defendant. In light of our resolution of the first claim of trial court error, we will not discuss the sentencing issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I. BACKGROUND

¶2 McCoy was involved in a crack-cocaine sale to Officer Derrick Harris. At trial, Officer Harris testified that the sale occurred during an undercover operation when Officer Harris approached McCoy and asked him if he had any crack-cocaine for sale. McCoy responded that he would take Officer Harris “to my guy if you cut me a piece.” Officer Harris accepted and McCoy led him to an empty lot, where McCoy signaled to Roger J. Winston. Winston came over, asked Officer Harris what quantity of drugs he wanted, and told Officer Harris to wait while he went to get the drugs. Officer Harris testified that Winston returned to the empty lot where he and McCoy were waiting and gave McCoy two corner cuts of cocaine base. Officer Harris gave Winston a twenty-dollar bill and

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

McCoy simultaneously gave the cocaine to Officer Harris. After the transaction was complete, Winston left and McCoy walked with Officer Harris. Officer Harris gave three one-dollar bills to McCoy and they parted. Uniformed officers arrested Winston approximately fifteen minutes after the sale, and they arrested McCoy about twenty minutes after the sale.

¶3 McCoy was charged with one count of delivery of fewer than five grams of cocaine, as party to a crime. During *voir dire*, the trial judge engaged in a colloquy with the potential jurors about illegal drugs. She asked them to explain how drugs have a negative effect on the quality of life in Milwaukee. During the colloquy, she often commented on and clarified the jurors' answers in front of the entire group. After a two-day trial the jury found McCoy guilty. The trial court sentenced McCoy to eight years' incarceration followed by four years of extended supervision.

¶4 McCoy filed a motion for postconviction relief, alleging that his conviction should be vacated and a new trial ordered because the judge unfairly prejudiced the jurors during the *voir dire*. He claimed that the judge appeared biased when she helped the potential jurors articulate the adverse consequences of drug use and raised issues that went beyond the scope of the jurors' responses. He also alleged that the trial judge prejudiced the potential jurors by conducting the colloquy before the entire jury pool instead of questioning each juror individually. We agree with the first contention, and, therefore, do not discuss the second. *See Gross*, 227 Wis. at 300, 277 N.W. at 665.

¶5 The trial court denied the motion without a hearing, concluding that the *voir dire* questions concerning illegal drugs were proper because their goal was to determine whether the jurors were biased. It also concluded that the questions

were proper because they did nothing more than reiterate or paraphrase the answers given by the potential jurors.

II. DISCUSSION

¶6 Although McCoy did not object to the trial judge’s *voir dire*, we do not apply waiver. See *Wirth v. Ehly*, 93 Wis. 2d 433–444, 443, 287 N.W.2d 140, 145 (1980) (waiver is a rule of judicial administration and is not absolute), *superseded on other grounds by* WIS. STAT. § 895.52. This issue presents a legal question, and the parties have thoroughly briefed it. Thus, we will decide it. See *Wirth*, 93 Wis. 2d at 444, 287 N.W. at 146.

¶7 The Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee a defendant an impartial jury. *Hammill v. State*, 89 Wis. 2d 404, 407, 278 N.W.2d 821, 822 (1979). The scope of *voir dire*, including the form and number of questions to be asked, rests within the discretion of the trial court. *State v. Koch*, 144 Wis. 2d 838, 847, 426 N.W.2d 586, 590 (1988). We will not disturb a court’s *voir dire* decisions unless the court erroneously exercised its discretion. *State v. Oswald*, 2000 WI App 2, ¶44, 232 Wis. 2d 62, 606 N.W.2d 207. The exercise of this discretion and the court’s restriction upon inquiries, however, are subject to “the essential demands of fairness.” *Aldridge v. United States*, 283 U.S. 308, 310, (1931).

¶8 There are three types of juror bias. *State v. Faucher*, 227 Wis. 2d 700, 716, 596 N.W.2d 770, 777 (1999). The first type of bias is statutory bias. *Id.*, 227 Wis. 2d at 717, 596 N.W.2d at 778. Statutory bias is controlled by WIS. STAT. § 805.08(1), which prevents a juror who 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”² from serving on a jury regardless of his or her ability to remain impartial. *Id.* McCoy does not allege, and the record does not suggest, that any of the jurors were statutorily biased in this case.

¶9 The second type of bias is subjective bias. *Id.* This type of bias “is revealed through the words and the demeanor of the prospective juror” and “refers to the prospective juror’s state of mind.” *Id.* “Discerning whether a juror exhibits this type of bias depends upon that juror’s verbal responses to questions at *voir dire*, as well as that juror’s demeanor in giving those responses.” *State v. Kiernan*, 227 Wis. 2d 736, 745, 596 N.W.2d 760, 764 (1999). Again, McCoy does not allege that any of the prospective jurors were subjectively biased.

¶10 The third type of bias is objective bias. *Faucher*, 227 Wis. 2d at 718, 596 N.W.2d 778–779. Objective bias recognizes that in some cases bias can be detected “from the facts and circumstances surrounding the prospective juror’s answers” even though he or she claims to be impartial. *State v. Delgado*, 223 Wis.

² WISCONSIN STAT. § 805.08(1) also governs the *voir dire* examinations of jurors and provides in its entirety as follows:

Jurors. (1) QUALIFICATIONS, EXAMINATION. 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 any 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 upon hypothetical questions.

2d 270, 283, 588 N.W.2d 1, 6 (1999). “[T]he focus of the inquiry into ‘objective bias’ is not upon the individual prospective juror’s state of mind, but rather upon whether the reasonable person in the individual prospective juror’s position could be impartial.” *Faucher*, 227 Wis. 2d at 718, 596 N.W.2d at 778.

¶11 Whether a juror is objectively biased is a mixed question of fact and law. *State v. Lindell*, 2001 WI 108, ¶ 39, ___ Wis. 2d ___, 629 N.W.2d 223. The trial court’s factual findings will be upheld unless they are clearly erroneous. *Id.* Whether those facts fulfill the legal standard of objective bias is a question of law. *Id.*

¶12 While McCoy does not specifically use the words “objective bias” in his brief, this is the form of bias that his allegations suggest. The potential jurors indicated that they could be impartial; however, the circumstances surrounding the *voir dire* are such that the trial court poisoned the well so that a reasonable juror could not be objective following ingestion of the water from that well. During *voir dire*, the trial judge engaged in an extensive colloquy with the potential jurors on illegal drugs as follows:

The Court: Please raise your hand if you think that within the last decade or so that the presence of illegal drugs in the greater Milwaukee area has had a negative impact on the quality of life. Raise your hand.

(Hands.)

... Let’s start with you, Miss J. Can you tell me what you think has been an impact on quality of life in the metro Milwaukee area as a result of the presence of drugs in the community?

Juror J.: There’s been a lot of crime.

The Court: Can you give us an example of the kind of crimes that you think are related to drugs?

Juror J.: For instance, the grandfather that had the little girl in the accident with the car that went into Lake Michigan. They said that he had been smoking marijuana.

The Court: The next person would be Mr. C. Can you tell us about your opinion in that regard?

Juror C.: I would say that maybe the more and more drugs that we have available to us or are available to the community or whatever, it seems like -- there just seems to be more and more of it.

The Court: And as a result of there being so much of it, where do you think -- what affects the quality of life, in your opinion?

Juror C.: [(]No response.)

The Court: There was a time when there were more and more hula hoops but that affected the quality [of] life in terms of recreation. What is there about drugs that make [sic] you feel that quality of life has been affected by their [sic] being more and more of them?

Juror C.: I think it gets to be younger and younger.

The Court: And younger people use drugs. What do you think happens to the quality of life in the community?

Juror C.: Certainly through education and whatnot.

The Court: It interferes with their education?

Juror C.: Yes.

The Court: Thank you very much. Miss G.

Juror G.: I think it creates too much crime, prostitution, people stealing.

The Court: So you're saying that people who use it commit crimes in order to obtain it?

Juror G.: Right.

The Court: And that makes the community an unhealthy community?

Juror G.: Correct.

The Court: Thank you. Miss Z.

Juror Z.: My experience as a nurse, I've seen in hospital [sic] lots of young people coming with cardiac problems that impinge --

The Court: So cardiac problems --

Juror Z.: Right.

The Court: -- in the hospital that you work with adults -- Just adults?

Juror Z.: Right.

The Court: So you believe that drug abuse has substantially affected individuals?

Juror Z.: Right. We use to help them.

The Court: It's a quality of life issue for them as individuals?

Juror Z.: [R]ight.

The Court: Do you believe that impacts the healthcare costs?

Juror Z.: Yes.

The Court: Thank you. The next person would be ... Mr. C.

Juror C.: I guess it would be violence....

The Court: And what do you attribute that to?

Juror C.: People that sells [sic] it, uses [sic] it. Before drugs[,] there seems to be violence present.

The Court: Thank you. Miss B.

Juror B.: I feel that there's a lot of drugs in the schools. That the children are getting it too young and it comes in there later on.

The Court: So you think that young children are taking drugs because they're too available?

Juror B.: Yes.

The Court: And that impacts how they'll turn out as an adult because of what's happening to them when their [sic] children?

Juror B.: That's right.

The Court: Thank you.... Miss S., you had your hand up, right?

Juror S.: Yes. I feel that availability of drugs have [sic] made parents less responsible for the kids, so it's [sic] impacted their education in a negative way.

The Court: Miss B., did you have your hand up too?

Juror B.: Yeah. I think it affects people's decision making.

The Court: Miss S., you had your hand up too?

Juror S.: Yes.

The Court: And what was your response of this?

Juror S.: The affect on the, I guess, general neighborhood as far as watching the children.

The Court: You have to be more careful to be sure the kids aren't affected by people --

Juror S.: Gangs....

The Court: Miss M.

Juror M.: I think that you can't turn on the television without seeing some crime or arrest of a young person because of drugs. And all the drive-by shootings and things. So I think that drugs have a negative impact on the community as a whole.

The Court: Thank you.... Miss F.

Juror F.: I guess I'm rather uncomfortable because I have no statistics to prove how I feel. But I certainly have the impression that there's an increase in cocaine especially -- actually, marijuana certainly with younger teen-agers and college students. But the cocaine permeates all part [sic] of our life.

Every social, economic group is using more cocaine, so I read. And I think that does affect decisions made. And certainly we read in the paper that cocaine was present and killings occur or whatever. So I think it does affect the quality of our life. I don't know that my life has been affected but our society is affected by it.

The Court: Thank you. Mr. R.

Juror R.: It's back on youth and violence. You've got to watch your kids all the time.

The Court: Miss F.

Juror F.: I lived in the neighborhood for the same years, and I've gone from feeling reasonably safe out in the yard with my kids, feeling [sic] scared to death to take my kids out. Because summertime means we have cop cars blocking off all the roads because there's a drug house in our neighborhood getting busted three times a week.

The Court: So you're personally affected by the cause of drug activity occurring near -- by your home?

Juror F.: Yes.

The Court: Thank you.... Mr. G.

Juror G.: Well, there's always the apparent threat of violence. And I also believe that there are a lot of people who just don't go out at night anymore because of what would happen to you.

The Court: Instability issue, don't know what's going to happen next, and the other one is fear?

Juror G.: Yes, ma'am.

The Court: Mr. K.

Juror K.: I feel that drug money could be better spent on food and clothing for their family.

The Court: So you're thinking if people are being deprived by people who have addiction programs, they have problems with abuse?

Juror K.: Yes.

The Court: So you're looking from the perspective of people who are dependant on people who are dependent on drugs?

Juror K.: Yes.

The Court: Thank you. Miss H.

Juror H.: Crime rate is going on. People are doing it just to get the money. Some money is going to buy the drugs so they could be dependent on them.

The Court: So you're saying there's [sic] crimes on other things that are anti-social behavior, the results are people can get what they need?

Juror H.: It affects the community because they don't want to go out because of the crime rate.

The Court: Mr. B.

Juror B.: I own a couple businesses. And we require drug tests before we hire people. And we'll send [ten] people out for drug test [sic] and eight of them will fail or try to get by and always get caught. We have a hard time getting employees, and they're losing employment opportunities.

The Court: So you're saying that people aren't being able [sic] to support their families because of their not being available for good paying positions because they can't pass drug tests, as an example?

Juror B.: Yes.

The Court: What kind of drug seems to be coming up the most in your experiences?

Juror B.: I do not see the test results.

The Court: Thank you. Miss L.

Juror L.: I've known too many people in the past who ended up in drug rehab clinics hooked on cocaine.

The Court: So there's a potential people lost healthcare and rehabilitation?

Juror L.: I don't have an opinion on the healthcare issue because I don't know enough. They lost their jobs. Quality of life is going down.

The Court: Thank you. Dependency issues?

Juror L.: Right.

The Court: Thank you. Miss B.

Juror B.: I think it affects the people's decision making when they use the drugs.

The Court: So they have an altered consciousness, you're saying?

Juror B.: Yes.

The Court: Mr. J.

Juror J.: I think it affects the homicide rate, because when crack cocaine showed up in Milwaukee in the early '90's, the homicide rate shot up from under 100 to 150, 160. So I think it definitely had an impact.

The Court: Thank you very much. So you're saying serious crime as a result, violent crime. Miss D.

Juror D.: I believe that it is too available to children. But for my own experience, I've had friends that have parents that do it, and they have all their children to do it. So I would say it's the parent's fault as well to get their children involved in it and think that it's okay.

The Court: So you're saying the breakdown of families?

Juror D.: Yes.

The Court: Thank you. Miss D.

Juror D.: Well, affect of crime and violence on our society.

The Court: Thank you. And Miss M.

Juror M.: I feel the same way. That it's attributed to high crime and homelessness.

The Court: Extreme dependence you're saying and people --

Juror M.: Economics.

The Court: -- people becoming unable to support a habit and giving up things that are the basis to life?

Juror M.: Yes.

The Court: I think we kind of got to the conclusion that most of you agree that drugs have had a negative impact on our community. Is there any reason, however, that even though almost all of you agree with that, that somehow you hold Mr. McCoy responsible for that just because he's accused of a drug-related offense?

Raise your hand if you just have -- you have this very negative opinion of him just because he's been accused because you've -- you have very bad feelings about the way drugs have impacted your community.

(No response.)

It is evident from this colloquy that the trial court went beyond the scope of investigating potential juror bias. While it is acceptable, and even desirable, for a trial judge to ask potential jurors about biases toward illegal drugs, *see United States v. Casey*, 835 F.2d 148, 150–151 (7th Cir. 1987) (trial court did not erroneously exercise its discretion when it questioned potential jurors to determine

whether their opinion on illegal drugs would impair their ability to remain impartial), the trial judge went beyond testing for bias when she asked the potential jurors to explain in exquisite detail why drugs have a negative impact on society. The *voir dire* reinforced, rather than assuaged any biases the jurors may have had by drawing their attention to the issue and making it more prominent in their minds.

¶13 Moreover, by commenting on the jurors' answers, and by helping them to expand upon and refine their answers, the trial judge abandoned her role as a neutral and detached official. Juries often look to judges for guidance and can be subtly influenced by their words and actions. See *United States v. Rhone*, 864 F.2d 832, 837 (1989) (a judge's verbal and nonverbal cues can influence a jury and cause it to place greater weight upon a particular issue). In this case, the judge and the jurors discussed the decline of the quality of life in the Milwaukee area due to drug use and the resulting adverse consequences which included: an increase in crime, prostitution, theft, rising health care costs, violence, the decline of local neighborhoods, and job loss. Thus, this trial court's *voir dire* instilled an objective bias against McCoy because he was charged with a crime involving illegal drugs. The trial court's lip-service admonitions to be fair nevertheless could not overcome the damage. See *Leviton v. United States*, 343 U.S. 946, 948 (1952) (mem. of Frankfurter, J.) (jury admonitions are like telling a little boy to stand in a corner and not think of a white elephant). Accordingly, the trial court erroneously exercised its discretion in conducting the *voir dire* as it did. We reverse for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

