

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2002

Cornelia G. Clark
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. 01-3052
STATE OF WISCONSIN**

Cir. Ct. No. 00-TR-10231

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MUSKEGO,

PLAINTIFF-RESPONDENT,

v.

ARTHUR D. DYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MARK S. GEMPELER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Arthur D. Dyer appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI). Dyer argues that the judgment should be reversed and a new trial ordered

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version unless otherwise noted.

because two of the potential jurors should have been struck for cause. We disagree with this contention and affirm the judgment of the trial court.

FACTS

¶2 Dyer was arrested for OWI and for operating a motor vehicle with a prohibited alcohol concentration (PAC). On August 14 and 15, 2001, a jury trial was held. During voir dire, Dyer asked that potential jurors D and Z be struck for cause due to bias. The trial court denied the request. Dyer then used two of his peremptory strikes to remove prospective jurors D and Z. The jury found Dyer guilty of OWI. Dyer appeals.

DISCUSSION

¶3 Dyer argues that the trial court erred in failing to strike for cause two prospective jurors on the grounds of objective and subjective bias.

¶4 Contrary to Dyer's contention that peremptory challenges are constitutionally guaranteed and therefore deserve de novo review, a defendant's right to a full complement of peremptory strikes is not grounded in the United States Constitution, but rather in state law. *State v. Lindell*, 2001 WI 108, ¶58, 245 Wis. 2d 689, 629 N.W.2d 223. The constitutional guarantee can only be raised if the defendant did not receive the peremptory challenges provided under state law. *Id.* Dyer is not alleging that he did not receive the peremptory challenges provided by state law.

¶5 A prospective juror should be removed for cause if he or she is (1) statutorily biased, (2) subjectively biased, or (3) objectively biased. *State v. Wolfe*, 2001 WI App 136, ¶19, 246 Wis. 2d 233, 631 N.W.2d 240, *review denied*, 2001 WI 117, 247 Wis. 2d 1034, 635 N.W.2d 783 (Wis. Sept. 19, 2001)

(No. 00-1959). Dyer alleges that potential juror D was both objectively and subjectively biased and that potential juror Z was objectively biased.

¶6 On appeal, the trial court’s finding of subjective bias, or lack thereof, will be upheld unless it is found to be clearly erroneous. *State v. Faucher*, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999). The trial court’s conclusion on objective bias will be reversed “only if as a matter of law a reasonable judge could not have reached such a conclusion.” *Id.* at 721.

JUROR D

¶7 Dyer argues that potential juror D was subjectively biased because his statements, responses and demeanor during voir dire indicated that he would be unable to be fair and impartial. We disagree.

¶8 Subjective bias exists when a juror’s words or demeanor during voir dire reveal any bias or prejudice in the case. *Id.* at 717. During voir dire, potential juror D indicated that he did not think it was possible to be a responsible driver after drinking even one drink and admitted that his own drunk driving conviction from a year earlier was still “pretty tough” for him because he had almost lost his eyesight.

¶9 Dyer has not shown that the trial court was clearly erroneous in not striking potential juror D for subjective bias. While potential juror D admitted that he was significantly affected by his own drunk driving conviction, he also repeatedly stated that he could sit fairly and impartially and keep from imposing his personal beliefs on the case. Everyone has life experiences they bring to the public service of serving as a juror. All the law asks is that jurors be able to set

aside their preconceived beliefs. Dyer has not shown that potential juror D was unable to sit fairly and impartially as a juror.

¶10 Dyer argues that potential juror D was objectively biased because a reasonable person in his position would be unable to set aside his or her experiences and beliefs. Again, we disagree.

¶11 Objective bias exists when the facts show that a reasonable person in a potential juror's position could not have remained fair and impartial. *See Lindell*, 2001 WI 108 at ¶38. Dyer uses the same examples to argue that potential juror D was objectively biased that he used to argue that potential juror D was subjectively biased. Dyer argues that the fact that potential juror D nearly lost his eyesight through his own drunk driving experience deeply affected him and his belief regarding drinking and driving was inextricably linked to the central issue in Dyer's trial.

¶12 Dyer has not shown that the trial court was unreasonable in concluding that potential juror D was not objectively biased. The central issue in the case was not whether Dyer was a responsible driver after one drink, but whether Dyer was guilty of OWI. Potential juror D agreed that “[i]t’s not illegal to drink and drive. It is illegal to drive while you are impaired.” In addition, the record contains ample dialogue between the attorneys and potential juror D upon which a reasonable trial court could find that potential juror D was not objectively biased.

JUROR Z

¶13 Dyer argues that potential juror Z was objectively biased. As stated above, objective bias exists when the facts show that a reasonable person in the

potential juror's position could not be fair and impartial. *Id.* During voir dire, juror Z stated that someone cannot be a good, responsible driver after one drink, that she does not ever drink alcohol because of this belief and that even if she did drink, she would never drive afterwards. Dyer argues that a person in juror Z's position would be unable to set aside these opinions and be an impartial juror.

¶14 Dyer has not shown that the trial court was unreasonable in concluding that potential juror Z was not objectively biased. As noted above, the central issue in the case was not whether Dyer was a responsible driver after one drink, but whether Dyer was guilty of OWI. Potential juror Z agreed with the statement that “[i]t’s not illegal to drink and drive. It is illegal to drive while you are impaired.” While it is apparent that potential juror Z had an opinion about drinking alcohol, no juror grows up in a vacuum. Potential juror Z did not indicate that she had any preconceived notions of the OWI offense that would prevent her from following the judge’s instructions as to what the law is, making it reasonable for the trial court to find that she was not objectively biased.

¶15 The purpose of Wisconsin’s juror bias law is to ensure that a defendant has a fair and impartial jury by allowing potential jurors who are “not indifferent in the case” to be excused. WIS. STAT. § 805.08(1). The trial court is in the best position to judge potential juror bias. We therefore affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

