COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1206 **Cir. Ct. No. 00-CI-1**

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

IN RE THE COMMITMENT OF GREGORY WILKINSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GREGORY WILKINSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Gregory Wilkinson appeals from an order committing him as a sexually violent person pursuant to WIS. STAT. § 980.06

(1999-2000).[1] He argues that one of the jurors should have been removed for cause because of subjective bias. We conclude that the circuit court's finding that the juror was not subjectively biased was not clearly erroneous and we affirm the commitment order.

¶2 At the outset we observe that the appellant's brief in this case demonstrates the continuing practice of the appellate bar to cite to and rely extensively on the decisions in ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998), and ***State v. Zurfluh***, 134 Wis. 2d 436, 397 N.W.2d 154 (Ct. App. 1986), with respect to the question of juror bias and the nature of our review. Such reliance is disturbing and misplaced because Wisconsin law regarding juror bias is more accurately reflected in the subsequent decisions in ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999); ***State v. Theodore Oswald***, 2000 WI App 2, 232 Wis. 2d 62, 606 N.W.2d 207; and ***State v. James H. Oswald***, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238. While it is true that ***Ferron*** and ***Zurfluh*** were not expressly overruled by any subsequent decision, what was said in those cases was clarified and reshaped in the ***Faucher*** and ***Oswald*** cases. We look to the ***Faucher*** and ***Oswald*** decisions for the applicable standards and ask that the appellate bar do so as well.

¶3 ***Faucher*** teaches that subjective bias "refers to the prospective juror's state of mind" and is "revealed through the words and the demeanor of the prospective juror" on voir dire. ***Faucher***, 227 Wis. 2d at 717. The existence of subjective bias is not merely dependent on the words used by the prospective

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

juror. Bias turns on the prospective juror's demeanor and the circuit court's assessment of the individual's honesty and credibility. ***Id.*** at 718. The circuit court's finding that a juror is not subjectively biased is a factual finding that will not be disturbed on appeal unless clearly erroneous. ***Id.***; ***Theodore Oswald***, 2000 WI App 2 at ¶19. Our standard of review recognizes that the circuit court is in a better position to assess the prospective juror's demeanor and tone. ***James Oswald***, 2000 WI App 3 at ¶5.

¶4 As part of the voir dire process, defense counsel informed prospective jurors that Wilkinson had been convicted of sexual assaults and imprisoned for those convictions. Counsel explained that jurors would be instructed that they could not conclude that Wilkinson would commit another sexual offense simply because he had done so in the past. Counsel asked prospective jurors if they would be more likely to believe that Wilkinson would reoffend knowing of his prior record. Prospective juror Phyllis S. responded such that she was questioned further by the circuit court. When asked, "Do you think you can set aside that feeling and decide the case solely on the facts you hear," Phyllis responded, "I probably could." Further examination elicited the additional response from Phyllis, "because it's a habitual accuser, a person that's done it habitually. I don't know if I can actually think that he won't do it again." Then the following exchange occurred:

> DEFENSE COUNSEL: You're going to be instructed by the judge and as I just said, you must presume that [Wilkinson] will not reoffend. Can you do that at this point right now?
>
> PHYLLIS S.: No, I don't think so.
>
> DEFENSE COUNSEL: Judge, I'd ask that [Phyllis] be excused for cause.
>
> . . . .

> THE COURT: [Ms. S.], there is a presumption of the fact that Mr. Wilkinson is a person who will not reoffend, but there are instructions of law that are going to be given you at the end of this case that are going to define what is a mental disorder and to what degree Mr. Wilkinson is able to control his behavior. You're going to need to apply those instructions to the facts that you hear and you're going to hear some facts in this case from various doctors. Do you believe that you could, even though you have some feelings about this case, be able to apply the instructions that I give you at the close of this case, to the facts as you hear them, and use that standard in looking at this case as opposed to, perhaps, your own personal opinion?
>
> PHYLLIS S.: I would like to think so, but I don't know if I could.

¶5 The circuit court denied the request to excuse Phyllis from the jury panel for cause. Phyllis served on the jury.

¶6 Wilkinson contends that Phyllis's responses indicated that she could not follow the instruction requiring her to presume until proven otherwise that Wilkinson would not reoffend. Citing her comments that she "probably could" set aside her feelings and that she "would like to think" that she could follow the instruction but did not know if she could, Wilkinson argues that Phyllis should have been struck as was required in ***Ferron***, 219 Wis. 2d at 501 (juror merely stated he could "probably" follow instruction), and ***Zurfluh***, 134 Wis. 2d at 439 (juror expressed that she was afraid she would be biased).[2] He characterizes her statements as unambiguously establishing subjective bias, leaving no room for the circuit court to assess her demeanor. *See* ***State v. Carter***, 2002 WI App 55, ¶12,

[2] Wilkinson also cites ***State v. Traylor***, 170 Wis. 2d 393, 397-98, 489 N.W.2d 626 (Ct. App. 1992), and ***State v. Carter***, 2002 WI App 55, ¶12, 250 Wis. 2d 851, 641 N.W.2d 517, as illustrative that responses that hedge on the ability to be impartial reflect subjective bias. Those cases involved a claim that trial counsel was ineffective for not requesting that prospective jurors be struck for cause.

250 Wis. 2d 851, 641 N.W.2d 517 (subjective bias determined as a matter of law when the prospective juror openly admitted his bias and his partiality was never questioned).

¶7 As we have already set forth, we do not decide by comparing the words used by Phyllis to those found to be inadequate assurance in other cases. What is critical here is that the circuit court found that Phyllis would genuinely attempt to follow the instructions given. Although Phyllis told defense counsel that she could not initially presume that Wilkinson would not reoffend, after further explanation of the presumption by the circuit court, Phyllis indicated that she thought she could base the decision on the facts and applicable standards rather than her own personal opinions. The circuit court explained at the hearing on postverdict motions that Phyllis's initial response was not unexpected as any reasonable person would feel discomfort with the subject of a sexual offender's recidivism. However, it found that Phyllis expressed a good-hearted and good faith intent to decide the case on the law and facts. The circuit court expressed that it did not sense Phyllis would perpetuate bias. This is the type of fact-finding dependent on the circuit court's observation of the prospective juror's demeanor and the attributes not revealed in an appellate record. The circuit court's finding that Phyllis was not subjectively biased is not clearly erroneous. There was no error in not striking her for cause.

By the Court.—Order affirmed.

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