COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2804-CR **Cir. Ct. No. 2005CF1640**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKOLAS S. CZYSZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 VERGERONT, J. Nikolas Czysz appeals a judgment of conviction for two counts of first-degree intentional homicide while armed with a dangerous weapon. Czysz contends he is entitled to a new trial because the circuit court erred when it dismissed a juror on the fourth day of trial after the court learned that

two of the juror's sons had been prosecuted by another prosecutor from the same district attorney's office prosecuting Czysz. We reject Czysz's argument because we conclude the circuit court properly exercised its discretion under ***State v. Gonzalez***, 2008 WI App 142, 314 Wis. 2d 129, 758 N.W.2d 153. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 The facts underlying this appeal are not disputed. On the fourth day of trial and outside the presence of the jury, the court informed counsel for both parties that the court had learned the evening before that one of the jurors had two sons recently prosecuted by a prosecutor from the same district attorney's office prosecuting Czysz. The court noted the juror had not responded when, during voir dire, the prosecutor in Czysz's case had asked the potential jurors whether any of them had "contact with the Racine County district attorney's office … in any way whatsoever."

¶3 The circuit court brought the juror into chambers for questioning in the presence of counsel. When the juror was asked why she failed to respond to the prosecutor's question whether any of the jurors had contact with the district attorney's office, she stated that she "had nothing to do with the DA" and that she "just went [to the court hearings] as a parent concerned with [her] kids." She also stated that she thought her sons "deserved to be punished," and that she was not angry with the district attorney's office for prosecuting her children.

¶4 The circuit court decided to dismiss the juror from the jury. In arriving at its decision, the court acknowledged that the State would have wanted to know this information. The court also stated that the juror "probably wouldn't have been stricken for cause" because she stated that she thought her sons

"deserved to be punished." The court explained its decision to the juror in this way: "[N]o one thinks that you were trying to withhold information, but because it may affect consciously or unconsciously your ability to fairly decide this case, we're going to excuse you from jury duty."

¶5 Because fourteen jurors were originally selected for the jury panel, the removal of the juror during trial left twelve jurors and one alternate juror remaining.

DISCUSSION

¶6 On appeal Czysz seeks a new trial on two grounds. First, Czysz contends the circuit court erred because it did not apply the "lack of juror candor" analysis discussed in ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999). According to Czysz, if we apply that analysis, the court erred when it dismissed the juror during trial for a reason that could have been identified prior to trial if the prosecutor had asked more specific questions during voir dire. Second, Czysz contends, even if ***Faucher*** does not apply, the court erred in dismissing the juror because the juror was not biased.

¶7 The State responds that ***Faucher*** does not apply and that the circuit court properly exercised its discretion consistent with ***Gonzalez***.

¶8 The decision to remove a juror for cause during trial is a discretionary decision for the circuit court. ***Gonzalez***, 314 Wis. 2d 129, ¶10 (citations omitted). We will not overturn a circuit court's exercise of discretion if "the discretionary determination is based upon facts in the record, application of the correct law, and a rational mental process arriving at a reasonable result." ***Id.*** (citation omitted).

¶9 We first address Czysz's contention that the circuit court erred in not applying the analysis of the "lack of juror candor" cases discussed in ***Faucher***.

¶10 In ***Faucher***, the supreme court clarified Wisconsin's jury bias jurisprudence in the context of deciding whether a circuit court erred in refusing to dismiss a juror for cause. ***Faucher***, 227 Wis. 2d at 705-06. Two aspects of ***Faucher*** are relevant to our review in this case. The first is ***Faucher***'s clarification of the terms used to describe the types of juror bias, ***id.*** at 706, and the second is ***Faucher***'s description of "lack of juror candor" cases. ***Id.*** at 726-28.

¶11 The ***Faucher*** court defined three specific types of juror bias recognized in Wisconsin: statutory, subjective, and objective bias. ***Id.*** at 716-17. A juror is statutorily biased when the juror meets one of the descriptions identified by the legislature as biased. ***Id.*** at 717. This includes those who are related by "blood or marriage to any party or to any attorney appearing in [the] case" and those who "[have] any financial interest in the case." ***Id.*** (alterations in original) (citing WIS. STAT. § 805.08(1) (1995-96)). Subjective bias refers to bias "that is revealed through the words and the demeanor of the prospective juror." ***Id.*** This includes "the occasion when a prospective juror explicitly admits to a prejudice, or … [bias is] revealed through his or her demeanor." ***Id.*** at 718. Finally, objective bias is focused "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." ***Id.***

¶12 After the ***Faucher*** court discussed these three specific types of juror bias, the court then discussed different types of cases where juror bias might arise. ***Id.*** at 721-28. This discussion included an overview of "lack of juror candor" cases. ***Id.*** at 726-28.

¶13 The "lack of juror candor" cases arise when a defendant moves for a new trial on the ground that one of the jurors on the jury that tried the defendant was biased. ***Id.*** at 726. In that type of case, the defendant must first establish that the juror "incorrectly or incompletely responded to a material question on voir dire." ***Id.*** (citation omitted). If the defendant successfully makes that showing, then the defendant must also establish that "it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." ***Id.*** (citation omitted).

¶14 Czysz argues that the circuit court should have applied the "lack of juror candor" analysis to the present case. Under this analysis, Czysz argues, the court should have first considered whether the juror incorrectly or incompletely responded to the prosecutor's questions on voir dire. According to Czysz, because the juror did not incorrectly or incompletely respond to the prosecutor's questions, the court should have "fault[ed] the prosecutor for asking vague questions [during voir dire]."[1]

¶15 We do not agree that the "lack of juror candor" analysis applies here. In "lack of juror candor" cases, the defendant asserts that one of the jurors on the jury that rendered the verdict was biased and should have been dismissed. In

[1] We note that defense counsel did not argue to the circuit court that this is the analysis it should employ in making its decision whether to dismiss the juror. When the circuit court asked defense counsel what his position was, defense counsel stated that he did not think what the juror had said provided a basis for dismissing her for cause, but he was "not sure what the standard is at this point." Defense counsel acknowledged that the prosecutor was denied some information that was probably important to the State, but stated that he did not think that was the test. Defense counsel stated that, in his view, the juror's answers to the court's question suggested inadvertence.

contrast, Czysz argues that a juror who was not biased should not have been dismissed. This is a significant difference, as the case law makes clear.

¶16 Circuit courts have a duty to ensure that the impaneled jury is free of bias or prejudice. ***Gonzalez***, 314 Wis. 2d 129, ¶21. "Lack of juror candor" cases involve the concern that a biased juror was impaneled, which implicates a defendant's constitutional right to an impartial jury. *See* U.S. CONST. amend. VI; WIS. CONST., art. I, § 7.[2] Here, Czysz is concerned that a juror who was not biased did not sit on the jury. However, a defendant, although entitled to fair and impartial jurors, is not entitled to "jurors who he hopes will be favorable towards his position." ***State v. Mendoza***, 227 Wis. 2d 838, 863, 596 N.W.2d 736 (1999) (citation omitted). "A defendant's rights go to those who serve, not to those who are excused." ***Id.*** Accordingly, we reject Czysz's contention that the "lack of juror candor" cases, as discussed by ***Faucher***, govern the present case.

¶17 We next address Czysz's argument that, even if the "lack of juror candor" analysis discussed in ***Faucher*** does not apply, the circuit court erroneously dismissed the juror. Czysz acknowledges that in ***Gonzalez*** we concluded a circuit court does not need to identify one of the three specific types of bias discussed in ***Faucher*** in order to dismiss a juror during trial. ***Gonzalez***, 314 Wis. 2d 129, ¶15. However, Czysz contends the present case is distinguishable from ***Gonzalez*** because in ***Gonzalez*** the circuit court expressly

[2] The Sixth Amendment to the U.S. Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed …." Article I, section 7 of the Wisconsin Constitution provides in part: "In all criminal prosecutions the accused shall enjoy the right … in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed …."

stated it was dismissing the juror "for cause," while in the present case the circuit court stated that the juror "probably wouldn't have been stricken for cause."

¶18 We reject Czysz's contention that ***Gonzalez*** does not govern the present case. For the following reasons, we conclude ***Gonzalez*** does govern and that the circuit court properly exercised its discretion when it dismissed the juror during trial out of concern that she might be unable to fairly and impartially decide the case.

¶19 In ***Gonzalez***, the circuit court dismissed an alternate juror prior to deliberations after it came to the court's attention that one of the State's witnesses recognized the juror and that the juror had gone to elementary school, middle school, and one year of high school with that witness and with the defendant. ***Id.***, ¶¶4-6. The circuit court ruled that it was dismissing the juror "for cause" out of concern that the juror might remember the defendant during the course of deliberations. ***Id.***, ¶13. After the juror was dismissed, Gonzalez was tried by a twelve-person jury that returned a verdict of guilty. ***Id.***, ¶15.

¶20 On appeal Gonzalez argued that the circuit court erroneously dismissed the juror and he was thus entitled to a new trial. ***Id.***, ¶7. We disagreed with Gonzalez and affirmed the circuit court. ***Id.***, ¶8. In doing so, we rejected Gonzalez's argument that, before the court could dismiss the juror, the circuit court was required to identify one of the specific types of bias defined in ***Faucher***—statutory, subjective, or objective. ***Id.***, ¶15. We held that "[a] demonstration of a specific bias of a juror is not needed to merely remove a juror from deliberations when there are twelve other jurors whose impartiality the trial court does not have a concern about." ***Id.*** (citation omitted).

¶21 Czysz argues that ***Gonzalez*** differs from the present case because in ***Gonzalez*** the court expressly stated that it was dismissing the juror "for cause." ***Id.***, ¶13. Here, Czysz points out, the circuit court stated that the juror "probably wouldn't have been stricken for cause" because the juror told the court that she thought her sons "deserved to be punished." However, when the circuit court statements from each case are read in context, it is evident that in both cases the circuit court was concerned about the *possibility* that bias might occur. Although the circuit court in ***Gonzalez*** stated it dismissed the juror "for cause," the court's explanation for dismissing the juror was that it was "a precautionary measure, because of the possibility of [the juror] being unfair to one side or the other and the possibility that it would cause a mistrial when [the juror] removed herself in the course of deliberations …." ***Id.*** Similarly, in this case the circuit court dismissed the juror as a precautionary measure because it was concerned that, despite the juror's responses to the court's questions, her sons' prosecution might affect her ability to be an impartial juror. The circuit court in this case, as in ***Gonzalez***, did not need to determine that there was one of the specific types of bias identified in ***Faucher*** that constitutes "cause." *See* ***id.***, ¶12.

¶22 We conclude the circuit court here properly exercised its discretion in dismissing the juror. The court followed the procedure we described in

Gonzalez, 314 Wis. 2d 129, ¶¶12-13; it explained its reasoning on the record; and there was a reasonable basis in the record for its decision.[3]

CONCLUSION

¶23 We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] Because we conclude the circuit court properly exercised its discretion, we do not need to address Czysz's contention that the circuit court's error in effect gave the State one more peremptory challenge than he had, thus entitling him to a new trial. However, we note that, even if there were circuit court error in this case, that would not automatically entitle Czysz to a new trial; instead, we would apply a harmless error analysis. *See* ***State v. Mendoza***, 227 Wis. 2d 838, 863-64, 596 N.W.2d 736 (1999). Under that analysis, we would not reverse the judgment of conviction unless "the error complained of has affected the substantial rights of the party seeking to reverse …." WIS. STAT. § 805.18(2) (2009-10). In ***Mendoza*** the court concluded that the circuit court's error in dismissing a juror was harmless because the defendant conceded he was convicted by an impartial jury. ***Mendoza***, 227 Wis. 2d at 864. Here, Czysz does not argue he did not receive an impartial twelve-person jury.