

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP2761-CR

Cir. Ct. No. 2011CF2107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

XIONG YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Xiong Yang appeals a judgment, entered upon a jury's verdict, convicting him on one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. Yang contends the trial

court erred in denying his motion for a mistrial based on juror bias. We conclude the trial court did not err, and we affirm the judgment.

¶2 During the jury's deliberations, it sent a note to the trial court, asking, "It has come out in deliberations that one juror has a family member who was involved with a sexual assault. Other jurors feel this was not disclosed in voir dire. Should this be our concern?"

¶3 The trial court brought the single juror out for individual questioning. She explained that the assault was against her first cousin and it had happened before she was born. She did not know many details about the assault, so it did not occur to her until a discussion during deliberations about a large family and a southside-Milwaukee house reminded her of her own extended family, including the cousin, that used to live in Milwaukee. When asked, the juror answered that her cousin's assault would not prevent her from being fair.

¶4 The trial court also individually questioned the foreperson. The foreperson confirmed the juror's description of the events that led to her disclosure. The trial court asked the foreperson whether he thought the juror's revelation seemed to be impacting her deliberations. The foreperson replied that he did not think so.

¶5 After the two jurors were sent back to the jury room, Yang moved for a mistrial. The trial court stated that it believed the juror "when she says she didn't think about this during jury selection, and that it didn't occur to her during the trial[.]" It also believed her "when she says she's not going to let this make any difference to her verdict[.]" The trial court thus concluded that the juror was neither subjectively nor objectively biased, and it denied the mistrial motion. The jury returned guilty verdicts on both counts shortly thereafter.

¶6 The trial court’s decision to deny a mistrial motion is discretionary. *See State v. Pirtle*, 2011 WI App 89, ¶25, 334 Wis. 2d 211, 230, 799 N.W.2d 492, 501. The question is whether, “in light of the whole proceeding ... the claimed error was sufficiently prejudicial to warrant a new trial.” *See State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). We will reverse the trial court’s decision only on a clear showing that the trial court erroneously exercised its discretion. *See Pirtle*, 2011 WI App 89, ¶25, 334 Wis. 2d at 230, 799 N.W.2d at 501.

¶7 “Prospective jurors are presumed impartial.” *State v. Funk*, 2011 WI 62, ¶31, 335 Wis. 2d 369, 388, 799 N.W.2d 421, 430 (citation omitted). “The party challenging a juror’s impartiality bears the burden of rebutting this presumption and proving bias.” *Ibid.* In assessing juror bias, we employ a two-step test. *Id.*, 2011 WI 62, ¶32, 335 Wis. 2d at 389, 799 N.W.2d at 430. We ask first whether “the juror incorrectly or incompletely responded to a material question on *voir dire*” and then, if so, whether “it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.”¹ *Ibid.* (citation omitted).

¶8 Questions of juror bias may implicate three kinds of bias: statutory, subjective, or objective.² *See State v. Faucher*, 227 Wis. 2d 700, 716, 596 N.W.2d 770, 777 (1999). These terms replace, but “do not neatly correspond to,”

¹ At no point in his brief does Yang identify the specific voir dire questions to which the juror failed to properly respond, nor does he assess the materiality of those questions. *See State v. Funk*, 2011 WI 62, ¶35, 335 Wis. 2d 369, 391, 799 N.W.2d 421, 431–432.

² Statutory bias is not an issue in this case.

terms that were previously used in discussing types of juror bias: implied, actual, or inferred. *See ibid.*

¶9 Subjective bias “refers to the prospective juror’s state of mind.” *Id.*, 227 Wis. 2d at 717, 596 N.W.2d at 778. It is based on the juror’s responses to questions and the trial court’s assessment of, among other things, the juror’s honesty and credibility. *Id.*, 227 Wis. 2d at 718, 596 N.W.2d at 778. We uphold the trial court’s factual determinations regarding subjective bias unless clearly erroneous. *Ibid.*

¶10 Objective bias considers whether a reasonable person in the juror’s position could be impartial. *Funk*, 2011 WI 62, ¶38, 335 Wis. 2d at 392, 799 N.W.2d at 432. When a case involves a seated juror “who was not forthcoming during voir dire,” a trial court is to consider three factors in the determination of objective bias:

(1) did the question asked sufficiently inquire into the subject matter to be disclosed by the juror;

(2) were the responses of other jurors to the same question sufficient to put a reasonable person on notice that an answer was required;

(3) did the juror become aware of his or her false or misleading answers at anytime during the trial and fail to notify the trial court?

Id., 2011 WI 62, ¶39, 335 Wis. 2d at 393, 799 N.W.2d at 432–433 (citations omitted).³ These factors are non-exclusive. *Id.*, 2011 WI 62, ¶39, 335 Wis. 2d at 393, 799 N.W.2d at 432. “Whether a juror is objectively biased is a mixed

³ Yang recites these three factors before asserting that the juror here had “actual bias.” Actual bias, however, is a closer analog of subjective bias. *See State v. Faucher*, 227 Wis. 2d 700, 717, 596 N.W.2d 770, 778 (1999).

question of fact and law.” *Faucher*, 227 Wis. 2d at 720, 596 N.W.2d at 779. We do, however, give weight to the trial court’s decision in that regard, as the trial court is “particularly well-positioned to make a determination of objective bias, and it has special competence in this area.” *See ibid.* We will reverse the trial court’s conclusion regarding objective bias “only if as a matter of law a reasonable judge could not have reached such a conclusion.” *Id.*, 227 Wis. 2d at 721, 596 N.W.2d at 780.

¶11 Yang contends that it does not make sense that the juror could sit through the week-long trial “and not have that trigger her memory regarding the fact that her cousin told her that he had been sexually assaulted.” He claims that it “was obviously in the back of her mind throughout the whole time” and that it “is not reasonable to believe that the first time she remembered this was during deliberations.” He also asserts that the juror’s “failure to respond during voir dire was not an honest failure.” However, we discern no factual or legal errors in the trial court’s decision.

¶12 With respect to subjective bias, the trial court explained that it believed the juror “when she says that she didn’t think about this during jury selection, and that it didn’t occur to her during trial[.]” The trial court also thought that the juror was “honest with us when she says she’s not going to let this make any difference to her verdict and she’s not going to let it influence her thinking through the deliberations.” The trial court noted that there was a question on voir dire “which I think would have drawn this information out of the jurors if this was the kind of experience ... that really did make a difference to her.” However, because the juror did not answer that question on voir dire, the trial court agreed with the State’s argument that “this was a remote enough experience to her [that] it

simply didn't occur. [Its] remoteness is something that assures me that this is something that she can set aside."

¶13 A determination of subjective bias hinges, at least in part, on the trial court's conclusions about a juror's honesty and credibility. *See id.*, 227 Wis. 2d at 718, 596 N.W.2d at 778. Based on the juror's testimony and the trial court's findings, we discern no basis for disturbing the conclusion that the juror was not subjectively biased.

¶14 With respect to its determination that the juror was not objectively biased, the trial court explained:

Her answers during jury selection and her answers during this little examination here lead me to believe that she's the kind of person who could know something like she knows and not have it occur to her until long after it might occur to somebody else....

....

Furthermore, I'm satisfied she did not become aware of the fact that she failed to answer the question until deliberations. Which means that her failure to answer the questions which was an honest failure didn't rob Mr. Yang of the opportunity to ask follow-up questions which might have led to him using a peremptory strike to remove her.

....

Objectively speaking, when a person has a cousin, even a first cousin who was a generation or half generation older and who, one, visits with only a couple times a year, I don't think that's the kind of person who is close enough to a juror to truly influence their feelings about things or at least I don't think you can say that as an objective matter.

¶15 Although the trial court's factual findings do not expressly refer to the three questions set out in *Funk*, it is clear from the trial court's comments that it at least implicitly considered them. We discern no basis for overturning the trial

court's decision on objective bias because the conclusion is, ultimately, one that a reasonable judge could reach. See *Faucher*, 227 Wis. 2d at 721, 596 N.W.2d at 780. The juror's cousin had been assaulted before she was born, police were not involved with the incident, the juror sees her cousin only "a couple times a year," and the juror indicated that "[e]ven his description seemed a little vague" when he mentioned the assault to her. Though Yang doubts it, it does not defy credulity to suggest this incident would not immediately spring to the juror's mind during voir dire or until deliberations.

¶16 We therefore uphold the trial court's determination that the juror was neither subjectively nor objectively biased. Thus, the mistrial motion was properly denied.

By the Court.—Judgment affirmed.

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

