COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2761-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCO A. VILLA,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Marco A. Villa has appealed from judgments convicting him of one count of burglary in violation of § 943.10(1)(a), STATS., and one count of second-degree sexual assault in violation of § 940.225(2)(a), STATS. The sole issue presented on appeal is whether the trial court properly struck for cause a sitting juror who failed to reveal during voir dire that he had recently been

prosecuted by the Kenosha county district attorney's office and was on probation. Because we conclude that the trial court properly struck the juror, we affirm the judgments of conviction.

The material facts are simple and straightforward. At the beginning of voir dire, the trial court asked both attorneys to introduce themselves, informing the prospective jurors that "[t]he purpose of this is simply so that you may be aware of contacts or acquaintances that you have so that you can respond as to whether you have knowledge of people or of events." The assistant district attorney representing the State introduced himself and named all of the other attorneys in his office. The trial court then asked the jurors whether any of them knew the assistant district attorney. As voir dire continued, the assistant district attorney also asked the prospective jurors:

> Is there anyone else here who has had any contact with the D.A.'s office? Not just as personal contact with the attorneys or the victim/witness people, but perhaps has been a witness in a case?

Dean Gitzlaff made no response to these questions and was subsequently selected for the jury. However, on the second day of trial the State moved to strike him, pointing out that Gitzlaff had previously been prosecuted by the Kenosha county district attorney's office and was on probation, but he had not answered when the prospective jurors were asked whether any of them had had any contact with the district attorney's office.

As set forth by Villa, a two-step process must be applied to determine whether a juror should be struck for cause based on an incomplete or inaccurate answer during voir dire. *See* ***State v. Olson***, 179 Wis.2d 715, 719, 508 N.W.2d 616, 618 (Ct. App. 1993). The party complaining of the juror's action

must demonstrate: (1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) 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. *See* ***id.*** at 719-20, 508 N.W.2d at 618.

Villa contends that the trial court erroneously exercised its discretion in striking Gitzlaff because Gitzlaff did not inaccurately or incompletely respond to the questions posed. We disagree.

Whether a juror was asked a certain question and gave an incorrect or incomplete answer are factual determinations for the trial court. *See* ***State v. Casey***, 166 Wis.2d 341, 348, 479 N.W.2d 251, 254 (Ct. App. 1991). We will not disturb factual determinations unless they are clearly erroneous. *See* ***id.***

The trial court found that Gitzlaff failed to respond to voir dire completely and accurately when he failed to answer when asked whether he had had any contact with the district attorney's office. We agree. Contrary to Villa's argument, the question as phrased was not limited to asking whether the prospective jurors had dealt with the district attorney's office as a victim or witness. It clearly asked whether the prospective jurors had had "any contact" with the district attorney's office. Because the record indicates that Gitzlaff previously had been prosecuted by the Kenosha county district attorney's office and remained on probation at the time of Villa's trial, it is clear that he should have responded when asked whether he had had "any contact" with the district attorney's office. The trial court's finding that Gitzlaff failed to completely and

accurately respond to a material question on voir dire therefore is not clearly erroneous and cannot be disturbed by this court.[1]

Villa contends that even if the first prong of the test for striking a juror was satisfied, the trial court's finding of bias should be set aside because Gitzlaff was never questioned as to his actual bias before he was struck from the panel. However, the bias of a prospective juror may be actual or implied and may be inferred from surrounding facts and circumstances. *See* ***State v. Wyss***, 124 Wis.2d 681, 730, 370 N.W.2d 745, 768 (1985). Bias may be either actual in fact or implied as a matter of law. *See* ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). Whether a prospective juror is biased and should be dismissed for cause is a matter lying within the trial court's discretion. *See* ***State v. Ramos***, 211 Wis.2d 12, 15, 564 N.W.2d 328, 330 (1997).

While the State concedes that bias is not necessarily implied merely because a juror has previously been convicted of a crime, it contends that the trial court properly found that the totality of the circumstances here implied bias. We agree.

The record indicates that Gitzlaff had been prosecuted by the Kenosha county district attorney's office on two occasions, having been placed on probation in 1992 and 1995. One of the convictions was for intimidation of a victim, a crime which by its nature could be construed as implying a heightened antipathy toward enforcement of the law. In addition, the prosecutor trying the

[1] The record indicates that Gitzlaff had provided information regarding his prior convictions to a jury clerk and in his jury questionnaire, and therefore perhaps misunderstood his responsibility to answer when questioned on voir dire. Nevertheless, the fact remains that he failed to accurately and completely answer a material question on voir dire, necessitating a consideration of whether it was more probable than not that he was biased.

case against Villa was the charging attorney in the 1995 case against Gitzlaff. He indicated that he had spoken extensively with Gitzlaff's employer and that the employer was quite upset with him because he opposed repeated requests by the employer for leniency on Gitzlaff's behalf. Gitzlaff remained on probation at the time of trial.

Based upon the prosecutor's opposition to leniency in a prior case wherein Gitzlaff remained subject to probation, the trial court reasonably could infer that Gitzlaff probably retained hard feelings against the district attorney's office and could not be impartial toward the State. Because these circumstances implied that it was more probable than not that Gitzlaff was biased against the prosecutor and the State, the trial court properly struck him for cause. Consequently, no basis to disturb Villa's convictions has been shown.

By the Court.—Judgments affirmed.

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