

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹

The sole issue on appeal is whether the circuit court violated Widiger's Sixth Amendment right to a fair and impartial jury by refusing to strike an impaneled juror who recognized one of the alleged victims in the case,² Mary.³ We therefore limit our discussion of the facts to those surrounding the impartial jury issue.

During voir dire, juror Brittany Rhodes did not respond to a question asking if she knew Mary. However, after Mary testified, Rhodes notified the bailiff that she had recognized Mary when Mary walked into the courtroom. Rhodes then told the circuit court that she had been in the same middle school grade as Mary around the time the assaults were alleged to have happened and that they had some mutual friends, although they "weren't exactly the best of friends" themselves. For instance, Rhodes stated that she had never been to Mary's house, that Mary had never been to her house, and that they had not shared rides. Rhodes said that she had the same relationship with Mary in high school as in middle school, meaning that they had friends in common, but were not themselves friends. Rhodes said she would not go out of her

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² The State points out that Widiger was acquitted on a separate felony sexual assault charge relating only to the alleged victim who was recognized by the juror, and that neither of the counts of conviction relate to that alleged victim. Widiger replies that the acquittal on that charge is irrelevant because claims of an impartial jury are not subject to harmless error analysis. We need not address the parties' arguments regarding the significance of the acquittal in light of our conclusion that the circuit court properly denied Widiger's motion to strike the juror.

³ Despite the acquittal, we will use a pseudonym instead of the alleged victim's name, consistent with WIS. STAT. RULE 809.86(4).

way to say “hello” to Mary if she saw her at school. At the time of trial, Rhodes was twenty-eight years old.

On examination by defense counsel, Rhodes agreed that she had likely heard things about Mary’s activities, reputation or character that would not be known to other jurors, although she had not heard anything about the alleged assaults. Rhodes did not specify any particular thing she had heard about Mary, and she did not say whether she had formed any opinion as to Mary’s character, whether positive or negative. Rhodes further stated that she believed she would be able to return a fair and impartial verdict, and that her prior acquaintance with Mary would not make it difficult for her to be fair in this case.

Based upon Rhodes’ testimony that she had heard things about Mary’s character, Widiger moved to strike Rhodes for cause and declare a mistrial. The circuit court denied the motion explicitly citing Rhodes’ assertion that she could be fair.

Wisconsin recognizes three categories of juror bias: (1) statutory bias based upon certain prohibited relationships or financial interests; (2) subjective bias based upon the juror’s state of mind; and (3) objective bias based upon whether a reasonable person in the juror’s position could be impartial. *State v. Faucher*, 227 Wis. 2d 700, 717-19, 596 N.W.2d 770 (1999). Jurors are presumed to be impartial, and a challenger to that presumption bears the burden of proving bias. *State v. Gilliam*, 2000 WI App 152, ¶5, 238 Wis. 2d 1, 615 N.W.2d 660.

On appeal, Widiger does not assert that there was any statutory bias, and he does not challenge the circuit court’s determination that Rhodes could be subjectively fair. He argues only that Rhodes was objectively biased.

Objective bias is established when the facts and circumstances reveal “such a close connection between the juror and the case” as to create a likelihood of an emotional involvement that would adversely affect the ability of any reasonable person to be impartial in such circumstances. *See State v. Delgado*, 223 Wis. 2d 270, 285-86, 588 N.W.2d 1 (1999) (analysis rephrased by this court to conform with current terminology); *see also State v. Lindell*, 2001 WI 108, ¶¶38, 46-48, 245 Wis. 2d 689, 629 N.W.2d 223 (explaining that *Delgado* was an objective bias case, even though it predated the adoption of that terminology in *Faucher*). The closer the juror is to crucial evidence, the more likely he or she is to be objectively biased. *State v. Oswald*, 2000 WI App 3, ¶8, 232 Wis. 2d 103, 606 N.W.2d 238 (1999).

Whether a juror is objectively biased is a mixed question of fact and law. *Faucher*, 227 Wis. 2d at 720. The circuit court’s factual findings regarding the circumstances surrounding voir dire will not be overturned unless they are clearly erroneous. *Id.* Whether those facts fulfill the standard of objective bias is a question of law, but subject to deference to the circuit court. *Id.* Thus, an appellate court will not overturn a circuit court’s legal determination as to objective bias unless, as a matter of law, no reasonable judge could have reached the same conclusion. *Id.* at 720-21.

Here, Widiger contends Rhodes had a “close connection” to the case because: (1) Rhodes had pre-existing knowledge of Mary’s activities, reputation and character through their mutual circle of friends; and (2) Rhodes’ outside knowledge was directly relevant to Mary’s credibility, which Widiger asserts was “the only contested issue in the case” and, in turn, bolstered the credibility of another victim who testified. Widiger argues that no reasonable person could be expected to set aside personal knowledge of another person’s reputation and character gained over a period of seven years as classmates. We disagree.

First, the circuit court made a factual finding, based upon judicial notice of attendance numbers in the year of the trial, that the middle school attended by Rhodes and Mary was a large school. Widiger does not challenge that finding as clearly erroneous, and we see nothing in the record that would undermine that finding. Additionally, there was no evidence to contradict Rhodes' assertion that she and Mary had not been friends themselves, although they had friends in common. Merely being acquaintances in a large school class does not create a close personal connection objectively likely to create an emotional involvement that would impair a person's ability to be impartial.

Second, contrary to Widiger's assertions, Rhodes did not at any point state that she had formed an opinion as to Mary's reputation or character. Therefore, Widiger's argument that Rhodes could not be expected to put any such opinion aside is misplaced. Similarly, given that Rhodes did not identify any information that she had heard about Mary, there is no basis to conclude that such information was of a nature that would create a lasting impression of any type. Moreover, because Rhodes explicitly stated that she had not heard anything about a sexual assault, there is no reason to believe that information Rhodes might have heard was close to crucial evidence.

In sum, we are satisfied that a reasonable judge could reach the conclusion reached by the circuit court here—namely, that Widiger had failed to overcome the presumption of impartiality and to establish objective bias on the part of Rhodes.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals