COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP439-CR **Cir. Ct. No. 2013CF21**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN L. PARISH,

DEFENDANT-APPELLANT.

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

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Shaun Parish appeals from a judgment convicting him of one count of repeated sexual assault of a child and from the order denying his motion for postconviction relief. He contends the prosecutor made inappropriate and prejudicial remarks in closing argument and that a juror's failure

to answer voir dire questions accurately, or at all, demonstrates the juror's bias. We disagree and affirm the judgment and order.

¶2 KMM, the fourteen-year-old daughter of Parish's long-time girlfriend, alleged that, when she was thirteen, Parish began lying on her bed with her several times a week, "caressing" her arms and legs and that the "caressing" progressed to a more sexual nature. KMM's mother saw Parish lying with her daughter a few times but thought he was just trying to wake her up for school. Parish contended KMM fabricated the claims. The jury found him guilty.

¶3 Postconviction, Parish moved for a new trial on grounds that (1) his counsel ineffectively failed to object to improper remarks the prosecutor made during closing argument and (2) at least one juror, AMM, was not candid during voir dire about having been sexually assaulted herself, resulting in bias against him. After a ***Machner***[1] hearing, the court denied the motion. It found that defense counsel had a strategic reason for not objecting, and that any objections would have been overruled. It also found that the type of sexual assault AMM experienced—college date rape—was irrelevant to the facts of this case and that Parish failed to show that AMM was biased against him. Parish appeals.

¶4 Parish first argues he is entitled to a new trial because, at closing argument, the prosecutor referred to Bible passages to implore the jury to "do justice," and suggested that, because KMM's father died when she was five years old, she merited special consideration. Parish contends the remarks were highly

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

inappropriate because the purpose of the remarks was to appeal to jurors' passions and religious proclivities.

¶5 Parish's failure to object to the prosecutor's comments or to move for a mistrial forfeited a review of this challenge on the merits. *See* ***State v. Miller***, 2012 WI App 68, ¶17, 341 Wis. 2d 737, 816 N.W.2d 331. Instead, we examine the claim in the context of ineffective assistance of counsel. *See* ***State v. Sprang***, 2004 WI App 121, ¶12, 274 Wis. 2d 784, 683 N.W.2d 522.

¶6 Parish contends counsel was constitutionally ineffective for failing to object during closing arguments and to move for a mistrial. To prevail, Parish had to show deficient performance that prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). That is, he had to show both "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment," which errors "deprive[d] [him] of a fair trial, a trial whose result is reliable." ***Id.*** at 687; ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶7 At closing, the prosecutor described KMM as a vulnerable young girl with no choice about where or with whom she lived. He also remarked:

> People have been writing about the concept of justice for four thousand years.... Listen to this. "Cursed be anyone who deprives the alien, the orphan, the widow of justice. Do justice for the orphan and the oppressed so that those from earth may strike terror no more. Give justice to the weak and the orphan. Maintain the right of the lowly and the destitute. Seek justice, rescue the oppressed. Defend the orphan, plead for the widow."

He argued that because the defense described some of KMM's actions as "desperate," "creepy," "clever," "crafty," "attention-seeking," "disturbing," "sexual," and "cold," it wanted to put *her* on trial. He contended a child should

not be held responsible for not locking her door, not getting out of the bed, or not wearing different attire.[2]

¶8 The prosecutor continued: "There has to be a reason … for you, as jurors, to find the defendant guilty. There are many." The prosecutor reviewed the evidence against Parish, then stated, "This is justice. Listening to this evidence and then going in there and making a decision and returning the verdict that is supported by the evidence and that's a verdict of guilty."

¶9 Defense counsel suggested that KMM, in a "parallel universe" or "alternate reality," concocted the accusations against Parish, and argued that it was suspect that KMM told no one about the claimed molestation during the two years it allegedly was occurring. The prosecutor responded in rebuttal:

> And what are the circumstances under which people like [KMM], and [KMM] in particular, who have been victimized do? Here is what some guy wrote thousands of years ago again. "Be the helper of the fatherless. Call the evildoer to account for the wickedness that he did that would not otherwise be found out." There's only two people in that room when this stuff is going on, her and him. And for that to be the case, you know, if—if we're talking about parallel universes and alternate realities, our world would look much different[]. We wouldn't be talking about something that occurred 2 years later, or over the course of a period of time or in other instances, which you know collectively, don't just immediately get found out. Decades sometimes…. But that's why, even thousands of years ago, somebody wrote about holding an evildoer to account for the wickedness that not otherwise would be found out, because people don't tell right away.

[2] Parish's mother testified that, in front of Parish and Parish's father and brother, KMM "[p]retty much" all of the time wore a "cami" and short shorts that barely covered her buttocks, and that KMM would sit on Parish's lap or get piggyback rides from him while dressed like that. She said she thought KMM should dress more modestly when grown men were present and that she had spoken to KMM's mother about her concern.

¶10 Trial counsel testified at the ***Machner*** hearing that, while his failure to move for a mistrial was an oversight, he deliberately did not object to the prosecutor's remarks because he wanted to highlight for the jury that the prosecutor's fervor "contrasted dramatically" with KMM's lack of emotion on the stand. His strategy was to cast doubt on KMM's credibility by arguing that the prosecutor showed more emotion than she did.

¶11 The trial court concluded that defense counsel made a reasonable tactical decision not to object to the prosecutor's remarks and that it would not have sustained an objection to them anyway, as they were not improper. A reasonable but unsuccessful strategy does not constitute deficient performance. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). Logically, then, counsel did not perform deficiently by not moving for a mistrial based on the prosecutor's argument, as such a motion would have been denied. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

¶12 Beyond that, the jury was instructed that the attorneys' closing arguments, conclusions, and opinions are not evidence, and that it should draw its own conclusions and decide its verdict based solely on the evidence under the instructions as given. *See* WIS JI—CRIMINAL 160. "Juries are presumed to follow the court's instructions." ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

¶13 In sum, the prosecutor's admittedly impassioned remarks may have neared the line of which Parish complains but we do not think they crossed it. The prosecutor did not identify the Bible as the source of the quotations or urge that Scripture or KMM's fatherlessness demanded a finding of guilt. He reminded the jury to examine the evidence. We therefore take his point to be that Parish, not

KMM, was on trial, that justice long has been an underpinning of society, that here justice required close consideration of the evidence presented, and that the evidence was sufficient to return a guilty verdict.[3]

¶14 Parish next contends he was deprived of his right to an impartial jury because juror AMM failed to disclose during voir dire that she had been the victim of sexual assault and therefore was biased against him.

¶15 We employ a two-step test to assess juror bias. ***State v. Funk***, 2011 WI 62, ¶32, 335 Wis. 2d 369, 799 N.W.2d 421. To be granted a new trial, a litigant must prove: "(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." ***Id.*** (citation omitted). Under the first step, if there is no factual dispute about the questions and answers, the sole issue is whether the incorrectly or incompletely answered question is material. ***Id.***, ¶33. A question is material if it "is of consequence to the determination of bias." ***Id.***, ¶35.

¶16 Postconviction, Parish argued that AMM was objectively biased.[4] Even if a juror pledges impartiality, whether he or she is objectively biased "turns

[3] We thus necessarily reject Parish's contention that the prosecutor's remarks amounted to plain error. They were not so "fundamental, obvious, and substantial" that "a new trial or other relief must be granted" despite the lack of objection to them. ***State v. Jorgensen***, 2008 WI 60, ¶¶20-21, 310 Wis. 2d 138, 754 N.W.2d 77 (citation omitted).

[4] There are three types of juror bias: statutory, subjective, and objective. ***State v. Funk***, 2011 WI 62, ¶36, 335 Wis. 2d 369, 799 N.W.2d 421. Statutory bias does not apply here. At the postconviction motion hearing, Parish expressly limited his argument to objective bias. Although he argues subjective bias on appeal, he has forfeited that right, *see* ***Townsend v. Massey***, 2011 WI App 160, ¶27, 338 Wis. 2d 114, 808 N.W.2d 155, and we do not address it.

on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge." ***State v. Lindell***, 2001 WI 108, ¶38, 245 Wis. 2d 689, 629 N.W.2d 223 (citation omitted). Determining objective bias presents a mixed question of fact and law. ***Id.***, ¶39. We uphold the trial court's factual findings unless they are clearly erroneous. ***Id.*** "Whether those facts fulfill the legal standard of objective bias is a question of law." ***Id.*** We do not defer to the trial court's decision on a question of law, but where factual and legal determinations are intertwined, such as in determining objective bias, we give weight to the court's legal determination. ***Id.*** We will reverse "only if as a matter of law a reasonable judge could not have reached such a conclusion." ***State v. Faucher***, 227 Wis. 2d 700, 721, 596 N.W.2d 770 (1999).

¶17 Parish alleges that AMM answered five material voir dire questions inaccurately or incompletely. The jury knew that the charge against him was repeated sexual assault of a child. First, the trial court asked: "I want to know if anybody has had, in their life experience, some experience with sexual assault that would make it difficult for them to listen to the testimony in this case?" The court explained:

> I want to find out from people if they're able to be impartial and listen to the evidence in this case that may come in from a variety of sources, but I understand that the nature of the case may be such that some people may have had some experience in their life in which they say gees [sic], Judge, it would be difficult for me to do that.
>
> So is there somebody who had something in their life of that nature?

¶18 Two jurors answered "yes" to the question and were further asked whether they nonetheless could be fair and impartial. AMM did not respond to the question but then testified at the postconviction hearing that her college boyfriend

"date raped" her. AMM also testified that she did not report the incident to the university or to police, that they continued their dating relationship, that she harbors no ill feelings toward him, and that the reason she did not answer the court's question was because she did "not believe that it would color [her] opinion in this case."

¶19 Second, the prosecutor asked whether "anybody kn[e]w somebody who was named as someone who had done a sexual assault" and if anyone "knew someone that had been accused of sexual assault?" AMM testified she did not report the incident and there is no evidence in the record that she "named" or "accused" her college boyfriend of sexual assault to anyone.

¶20 Third, the prosecutor asked: "Has anyone actually been the victim of a reported crime such as a theft, or your mailbox gets damaged, or anything like that?" AMM also did not respond to this question. Parish points to no evidence in the record to suggest she ever was a victim of any type of reported crime.

¶21 Fourth, Parish alleges that AMM's nonresponse to the prosecutor's question, "Have any of you ever been a witness in a court case?" was inaccurate. Again, no evidence in the record suggests AMM was a witness in a court case and Parish does not develop the argument further.

¶22 Fifth, Parish alleges that AMM failed to respond to defense counsel's question, "How many of you have had any experience with what we call the criminal justice system[:] courts, police, prosecutors, defense lawyers, investigators?" AMM *did* respond, however, stating that she had experience with the court system due to a divorce. There is no evidence to suggest she had any undisclosed experience with the criminal justice system.

¶23 To the extent any or all of these five questions were material, we agree with the trial court that her responses were accurate.

¶24 A second issue with AMM is that she testified that she felt "harassed" into finding Parish guilty and, on her pastor's advice, wrote a letter to Parish's mother. Signing it only "Unconvinced in guilt," AMM wrote that she spoke to her children about KMM after the trial. Her children are KMM's age and attend the same school. She wrote that "the feedback they gave me confirmed to me my belief in your son's innocence" and asked for the mother's forgiveness for "not being strong enough or convincing enough to persuade 10 other jurors to change their minds."

¶25 AMM did not have to persuade anyone. The jurors were instructed before deliberating that the presumption of innocence "requires a finding of not guilty unless … you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty," and that "all 12 jurors must agree in order to arrive at a verdict." *See* WIS JI—CRIMINAL 140 AND 515. If she had a reasonable doubt as to Parish's guilt, her duty was to find him not guilty. And when the jury was individually polled, AMM answered that the finding of guilty is and was her verdict. The fact that she now regrets her vote does not vitiate the verdict. The letter she sent to Parish's mother cannot be used to impeach the verdict. *See* WIS. STAT. § 906.06(2) (2015-16).[5]

¶26 As to bias, "[p]rospective jurors are presumed impartial." ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). The party challenging a

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

juror's impartiality bears the burden of rebutting this presumption and proving bias. ***Id.*** The trial court found that AMM "certainly … wasn't explicitly biased … [or] even implicitly biased" against Parish. We must agree.

¶27 The prosecutor and AMM had this exchange at the postconviction motion hearing:

> **Q** Do you feel in any way that you were an unfair juror against Mr. Parish during the course of the time that you were asked to serve as a juror?
>
> **A** Define "unfair," please.
>
> **Q** That Mr. Parish didn't get a fair trial. That you had a bias against him and that, as a result of your bias, Mr. Parish is going to be found guilty no matter what the evidence suggested or what the judge told you?
>
> **A** There was no bias.
>
> **Q** Not—not that way at all?
>
> **A** Absolutely not.

¶28 If despite her testimony of no bias AMM felt any at all, we conclude it was in Parish's favor.

By the Court.—Judgment and order affirmed.

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