COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP127-CR

Cir. Ct. Nos. 2008CF10
2008CF110

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY GROVER GUTHMAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Anthony Grover Guthman appeals from judgments convicting him of first-degree sexual assault of a child, repeated sexual assault of the same child and incest. He also appeals from an order denying his

postconviction motion seeking a new trial on grounds that the jury included a biased juror and that the voir dire record was irreparably defective in terms of identifying a venireperson who claimed to be acquainted with a potential witness.

¶2 In the first matter, we agree with the trial court's determinations that the ultimately empaneled juror did not demonstrate bias, nor would a reasonable person holding like beliefs. The second argument goes nowhere because, since the potential witness never testified, the defense does not establish a "colorable need" for the potential juror's identity, the defense could have learned it with minimal effort, and Guthman concedes the issue by failing to refute the State's responding arguments in his reply brief. We therefore affirm.

¶3 Guthman was charged with first-degree sexual assault of his ten-year-old niece and, in a separate two-count complaint involving his now-adult daughter, repeated sexual assault of the same child and incest. The cases were consolidated for trial. The jury convicted Guthman of all three counts. He moved unsuccessfully for postconviction relief raising the juror bias issues described above. He appeals on the same grounds. We will set forth the facts relevant to each issue in the following discussion.

¶4 Guthman first asserts that the court erred in failing to excuse Daniel Weis, a juror he claims was subjectively and objectively biased. During voir dire, the court read the information to the entire pool of potential jurors and asked whether any of them believed they could not be fair and impartial because of the nature of the allegations or for any other reason. Panelists who raised their hands were questioned individually in chambers. Weis was one of them.

¶5 As the following in-chambers exchange shows, Weis essentially said he would "kill" someone who sexually assaulted one of his five granddaughters

and that, while he believed the fact that Guthman was charged meant there was "strong evidence" against him, he "would not feel it's automatic guilt" and would try to look past his feelings, listen to the evidence and follow the jury instructions.

> THE COURT: Mr. Weis, you've indicated that because of the nature of the case, it may pose problems for you with regard to the ability to be fair. Can you just briefly tell us why you believe that to be the case?
>
> JUROR: Well, I've got five granddaughters, all five of which slept over Saturday night, and I have trouble thinking in terms of the defendant, what I'd do to him if he did that to one of my granddaughters. I mean, it's basically that simple.
>
> THE COURT: Okay. Miss Martinez [the prosecutor]?
>
> MS. MARTINEZ: Sir, does that mean that you would not be able to sit and listen to the evidence as it's presented to you and then receive the jury instructions from the judge and then follow those jury instructions?
>
> JUROR: I would attempt to do that. I'm not sure I could look past my feelings.
>
> MS. MARTINEZ: Do you believe that Mr. Guthman is guilty by virtue of the fact he's been accused?
>
> JUROR: I'm quite sure there's strong evidence, but no, I would not feel it's automatic guilt.
>
> MS. MARTINEZ: So you would be able to listen to the evidence and make a determination?
>
> JUROR: I think so, but I'm not going to, you know.
>
> MS. MARTINEZ: Everybody brings th[eir] life experiences.
>
> JUROR: I've made the statement if somebody did that to one of my granddaughters, there wouldn't be a trial. I'd kill him. Take that for what it's worth.
>
> THE COURT: Miss Anderson [defense counsel], any questions?

MS. ANDERSON: Mr. Weis, obviously at this point Mr. Guthman is merely accused of doing something, correct?

JUROR: I'm aware of that.

MS. ANDERSON: Okay. And I understand you have five granddaughters and that you feel very strongly about what punishment should be enacted?

JUROR: Yeah.

….

MS. ANDERSON: I assume that's a pretty strongly-held belief based on how you expressed it to us?

JUROR: Absolutely.

MS. ANDERSON: And I assume you've held that belief for quite some time?

JUROR: As long as I can remember.

….

MS. ANDERSON: And I don't think any of us in this room can convince you that something else is true other than that, would that be fair?

JUROR: I'm pretty stubborn.

MS. ANDERSON: …. My concern is that that belief will interfere with your ability to listen to witnesses here. What do you think about that?

JUROR: I don't think so, but, you know, I'll be the first to admit internal prejudice can be tough to overcome.

MS. ANDERSON: The reason why I make that statement is because if you do listen to some children who are witnesses in this case –

JUROR: Uh-huh.

MS. ANDERSON: Will you unconsciously transfer your granddaughters' image to any of those witnesses?

JUROR: Well, my granddaughters will tell you Grandpa's a sucker. Yes. I mean, a little girl is a little girl, whether they're my granddaughter or not.

¶6 After the court excused Weis from chambers, defense counsel expressed a concern that she was unsure if Weis would be able to set aside his view of "what he believes punishment should be for someone who has committed this particular crime." The court declined to strike Weis for cause on the basis that Weis said he would try to be fair, which is "all that we can ask for from anyone." Weis remained on the jury throughout the trial. The jury returned a guilty verdict an hour and twenty minutes after beginning deliberations.

¶7 Guthman first asserts that Weis should have been stricken for being subjectively biased. "Subjective bias" is the opinion or prejudice a prospective juror reveals on voir dire, and refers to his or her state of mind. *See* ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). Determining subjective bias requires assessing whether the record reflects that the juror is a reasonable person sincerely willing to set aside that opinion or prejudice. ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999).

¶8 Because it refers to a prospective juror's state of mind, subjective bias often is revealed only through his or her demeanor. *See* ***Faucher***, 227 Wis. 2d at 717. The trial court is uniquely positioned to assess the person's demeanor and tone, ***State v. Oswald***, 2000 WI App 3, ¶5, 232 Wis. 2d 103, 606 N.W.2d 238, and to assess his or her honesty and credibility, *see* ***Faucher***, 227 Wis. 2d at 717-18. We therefore will uphold the trial court's determination of subjective bias unless clearly erroneous. *See* ***Oswald***, 232 Wis. 2d 103, ¶5.

¶9 Guthman argued that Weis was subjectively biased because he said "out of his own mouth that he couldn't be fair here, he couldn't … or wouldn't separate how he views his granddaughters in a situation like this from how he would view the victim in this case." The trial court concluded that Weis was not

subjectively biased. When asked whether he could listen to all the evidence and follow the jury instructions, Weis acknowledged that he was "not sure [he] could look past [his] feelings," but indicated he "would attempt to do that." He also indicated he did not think his long- and strongly-held belief that such crimes merit severe punishment would interfere with his ability to listen to the witnesses, or that the allegations translated to "automatic guilt."

¶10 Later, when the court asked the potential jurors if any already had made up his or her mind or "cannot or will not try this case fairly and impartially on the evidence … and under the instructions … render a true and just verdict," Weis did not respond. Nor did he respond when the prosecutor asked whether anyone felt unable to sit through days of talking about first-degree sexual assault of a child, repeated sexual assault of a child and incest. By this time, Weis well knew the nature of the charges. He did not indicate that he could not be fair.

¶11 The court found that Weis conceded the difficulty in overcoming internal biases, but also "conveyed to the Court the impression that he understood that an accused is presumed innocent until proven guilty" and would try to be a fair juror. The court concluded that Weis' effort was "all that we can ask for from anyone" and refused to strike him from the panel. The court defended that decision at the postconviction motion hearing. It observed that, in light of the "heinous," "repulsive" and "horrible" allegations against Guthman, Weis' answers were not unusual. It concluded that Weis' responses supported a finding that he was a reasonable person sincerely willing to put aside an opinion or prior knowledge. *See* ***State v. Ferron***, 219 Wis. 2d 481, 498, 579 N.W.2d 654 (1998), *abrogated on other grounds by* ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

¶12 Such questions should be largely left to the trial court's discretion. *See* ***id.*** at 501. Although Weis indicated that he thought there probably already was strong evidence against Guthman just by virtue of the State having charged him, Weis plainly stated that he "would not feel it's automatic guilt." A prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. ***Oswald***, 232 Wis. 2d 103, ¶6. How the juror communicates is essential to assessing the person's sincerity—which is why we leave the determination of subjective bias to the trial court. *See* ***id.*** Given the court's superior position for assessing Weis' honesty and credibility, we are satisfied that its conclusion that he was not subjectively biased is not clearly erroneous.

¶13 Guthman also contends Weis was objectively biased because a reasonable person holding his strong and emotional beliefs could not be impartial. *See* ***Faucher***, 227 Wis. 2d at 718. Important to an objective bias inquiry are the "facts and circumstances surrounding the voir dire and the facts involved in the case." ***Id.*** We will not reverse the trial court's determination of objective bias unless as a matter of law a reasonable judge could not have reached the same conclusion. ***Oswald***, 232 Wis. 2d 103, ¶5. This standard of review—higher than clearly erroneous but still very deferential—is warranted due to how intertwined the trial court's legal conclusion is with the underlying factual findings. ***Id.***

¶14 Exclusion of a prospective juror for objective bias requires either a direct or personal connection between the challenged juror and an important aspect of the case or, not alleged here, a firmly held negative predisposition by the juror toward the justice system. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶19, 232 Wis. 2d 138, 606 N.W.2d 196. The trial court found that Weis' vehemence sprang from his belief that one who actually sexually assaults, or commits incest with, a

child merits severe punishment, that he might be the one exacting revenge were one of his granddaughters the victim, and that "most people objectively, if they were honest with themselves," would feel the same way. Because jurors do not decide punishment, the court found no "direct critical personal connection" between Weis and crucial evidence or a dispositive issue. "[W]hat he thinks the punishment ought to be … doesn't go to the issue of whether or not he can be fair in evaluating the evidence" and deciding Guthman's guilt. Based upon all of the facts and circumstances surrounding Weis' voir dire, we conclude as a matter of law that Weis was not objectively biased. We uphold the trial court's ruling denying the challenge for cause.

¶15 The final issue is whether the trial court properly determined that Guthman was not entitled to a new trial based on an unidentified venireperson's acquaintance with a defense witness who did not testify at the trial. According to testimony at the postconviction motion hearing, early in voir dire defense counsel read the list of potential defense witnesses to the entire jury pool. One of the potential jurors not yet selected indicated she[1] was acquainted with "Deputy Forray," and stated she was "not sure" if their acquaintance would prevent her from keeping an open mind, but told the court she knew nothing about the case before entering the courtroom, never discussed the case with Deputy Forray or anyone else and had formed no opinion about the cumbersome matter. The record does not identify the potential juror by name or juror number or indicate that either counsel asked her any questions.

[1] Two people testified about the issue at the postconviction motion hearing. The victim-witness coordinator testified that the potential juror was a middle-aged Caucasian woman; defense counsel did not recall any identifying characteristics of the person. Our use of the feminine pronoun is simply to avoid an unwieldy construction, not to state a fact.

¶16 Guthman argues that the record is defective because testimony at the postconviction motion hearing was insufficient to reconstruct the "gaps," so to speak, in the trial transcript so as to permit identification of the potential juror or to determine whether that person was empaneled. Looking to ***State v. Perry***, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987), Guthman suggests that the mere inability to reconstruct the record requires that he be granted a new trial.

¶17 We disagree. First, as the State notes, defense counsel easily could have contacted the sitting jurors to determine whether one of them was the one who knew Detective Forray. Second, and more determinative, Forray never testified. The State argues that Guthman thus failed to carry his burden of demonstrating a "colorable need" for the identity of the venireperson or that the missing information was more than of a trivial nature. *See* ***id.*** at 108. Third, Guthman stands mum in his reply brief. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Judgments and order affirmed.

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