STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP254-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

TODD BRIAN TOBATTO,

Defendant-Respondent.

On Appeal from an Order Granting a New Trial, Entered in the Circuit Court for Milwaukee County, the Honorable Mary Triggiano Presiding at Trial, and the Honorable Lindsey Grady Presiding at the Postconviction Stage

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BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

1. Did the circuit court correctly find that Mr. Tobatto's trial attorney was ineffective for failing to take steps to remove Juror No. 10 in a case in which Mr. Tobatto was charged with stalking and violating a harassment restraining order, when Juror No. 10 admitted during *voir dire* that she did not know if she could be 100% objective because of her experience as a victim of harassment and threats by her former partner?

The circuit court granted Mr. Tobatto's postconviction motion for a new trial, finding that his trial attorney was ineffective, and prejudicially so, for failing to either further question the juror's statement of admitted bias, challenge the juror for cause, or use a peremptory challenge to remove the juror.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Tobatto does not request oral argument because the briefs will adequately address the issue presented. He does not request publication because the case can be resolved by applying established legal precedent to the facts.

STATEMENT OF THE CASE AND FACTS

On January 31, 2013, the State charged Mr. Tobatto with one count of stalking and one count of violating a harassment restraining order, both as a repeater. (2:1). The complaint alleged that between October 17, 2012 and January

28, 2013, Mr. Tobatto sent numerous harassing text messages and Facebook messages to his ex-girlfriend. (2:1-4).

Mr. Tobatto exercised his right to a trial by jury, and the case was tried over a three-day period on May 20-22, 2013. (61-65). The Honorable Mary Triggiano presided over the trial. (*Id.*) Thirty prospective jurors were examined during *voir dire*, of which thirteen were ultimately selected for trial. (61:4, 29-36, 66-67).

During *voir dire*, the prosecutor asked all the prospective jurors whether any of them had been through a bad breakup before, and approximately 60% raised their hands. (61:47). The prosecutor then asked the prospective jurors if any of them had ever been "harassed by an ex-spouse or significant other" after a break up. (61:47). Nine of the prospective jurors raised their hands (Juror Nos. 8, 9, 10, 11, 18, 21, 24, 27, and 28). (61: 47-58). Upon further questioning by the prosecutor, eight jurors stated that they had been the victims of domestic violence or harassment by a former spouse or partner (Nos. 8, 9, 10, 18, 21, 24, 27, and 28), and one indicated that she had been sexually assaulted by a stranger (Juror No. 11). (61:47-58).

In addition to identifying herself as a victim of harassment by a former partner, during follow-up questions by the prosecutor, Juror No. 10 expressed doubts about her ability to be fair and impartial as a result of her experiences. In this regard, the following exchange occurred:

> [Prosecutor]: Ma'am why did you raise your hand?
>
> Juror 10: I had a similar situation where with an ex he threatened me after we broke up.
>
> [Prosecutor]: Threatened you?

Juror 10: Yeah.

[Prosecutor]: Do you mind being a little more specific?

Juror 10: We – like whip my ass pretty much.

[Prosecutor]: Did anything come of it?

Juror 10: We went through the court system. The police came and –

[Prosecutor]: Did you file for a restraining order against him?

Juror 10: Yes.

[Prosecutor]: Okay. And was that restraining order granted?

Juror 10: It was a no contact. I don't know if that's the same as a restraining order.

[Prosecutor]: Probably.

Juror 10: Yeah, that was granted.

[Prosecutor]: Did you go to the 7th floor of the courthouse and petition for an order?

Juror 10: No, the officer pretty much had me sign something right at the time of the incident.

[Prosecutor]: Okay. Well, after the fact was that order violated?

Juror 10: No.

[Prosecutor]: Okay. So your ex abided by it?

Juror 10: Well, he called me?

[Prosecutor]: In violation of the order?

Juror 10: Yeah

[Prosecutor]: Did anything criminal come of it?

Juror 10: No.

[Prosecutor]: Okay.

Juror 10: We're still – we have a child together, so we're still like going through the system.

[Prosecutor]: *So the same questions I've asked for jurors number 8 and 9, if you're selected will you be able to set that experience aside and be a fair and impartial juror?*

Juror 10: *I don't know if I'll be a hundred percent objective because I had my personal experiences that impact what I believe now as far as the law. I mean, I'm not going to go against what that says, but I know that's for interpretation, as well.*

(61:49-51) (emphasis added). Juror No. 10 also stated that she had been harassed by her ex-boyfriend by electronic communications. (61:64).

After this exchange, defense counsel did not ask Juror No. 10 any follow-up questions regarding her doubts about her objectivity, did not ask the court to remove her for cause, and did not use a peremptory challenge to strike Juror No. 10.

Instead, defense counsel used his five peremptory challenges on Juror Nos. 3, 8, 9, 18, and 21. (67:23; 70). Defense counsel had asked the trial court to strike Juror No. 21 for cause, as she had also questioned her ability to be fair

and impartial (61:53-54, 72-73); however, the court refused to do so, stating that its "notes indicated that she said she could do her best to be fair." (61:72). Thus, defense counsel was forced to use one of his peremptory strikes against Juror No. 21, who was one of the nine jurors who stated they had been the victims of harassment or domestic violence. (61:53-54). Defense counsel also used three peremptory challenges on other jurors who had been the victims of harassment or domestic violence (Juror Nos. 8, 9, and 18). (61:47-53; 67:23). He used his fifth peremptory challenge on Juror No. 3, who did not indicate any harassment by a former partner.[1] (67:23).

In addition, the trial court struck Juror No. 11, who had been the victim of a sexual assault by a stranger. (61:72). Juror Nos. 27 and 28 also did not wind up serving on the jury. That left Juror Nos. 10 and 24 of the nine who had experienced domestic violence or harassment. The final thirteen jurors selected for trial were Juror Nos. 1, 2, 4, 10, 12, 13, 14, 15, 17, 20, 22, 24, and 26. (61:66-67; 70). Juror No. 2 was ultimately dismissed by the court without objection because he kept dozing off. (62:62; 63:60-62, 67-68).

On May 22, 2013, the jury returned verdicts of guilty on both counts. (20; 21;65:4). Thereafter, on July 31, 2013, the court sentenced Mr. Tobatto to five years of initial confinement and three years of extended supervision for stalking, and to one year of initial confinement and one year of extended supervision for violating a harassment retraining order, concurrent to his sentence for the stalking count. (66:19).

[1] Juror No. 3 identified herself as an attorney. (61:25).

Mr. Tobatto subsequently filed a Rule 809.30 postconviction motion seeking a new trial on the grounds that his attorney was ineffective for failing to either further question Juror No. 10 about her admitted bias, challenge her for cause, or use a peremptory challenge to remove her from the jury.[2] (32:1-2, 5-10).

A ***Machner***[3] hearing was held before the Honorable Lindsey Grady on October 9, 2014. (67). At the hearing, Mr. Tobatto's trial attorney admitted that he did not ask Juror No. 10 any follow-up questions regarding her admitted doubts about her objectivity, how her personal experiences as a victim of harassment might impact her decision in the jury room, or about her statement that the law was open for interpretation. (67:32-33).

Mr. Tobatto's trial counsel testified that he decided to keep Juror No. 10 on the panel because he thought she would be "a good juror for our case." (67:17). He testified that he formed that opinion because "[s]he seemed logical and not – not emotional about the issues when she answered, rather straightforward and confident." (67:17-18).

When asked if her prior experience with harassment gave him pause, defense counsel stated "[i]t did." However, he further stated, "from her demeanor, it didn't seem like she

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[2] In his postconviction motion, Mr. Tobatto also asserted that his trial attorney was ineffective for failing to ask follow-up questions or seek the remove of several other jurors. In addition, he asserted that the circuit court abused its discretion by failing to remove some of these other jurors for cause. (*See generally* 32). The circuit court did not address these other claims in its decision, and Mr. Tobatto does not raise them in this appeal.

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

was upset by it, and I believe she said that she would follow up, be fair and impartial the best she could." (67:18).

Counsel further testified that it was his intent to use his peremptory strikes against jurors who had domestic violence-related issues. (67:19). He stated that the other jurors whom he had exercised peremptory strikes on "may have seemed more emotional to [him] about the issues and not as confident in their answers." (67:20). He indicated he ranked all the jurors who identified themselves as victims of harassment or domestic violence and tried to exclude the ones he thought were most prejudicial as "best [he] could at the time." (67:40).

On December 29, 2014, Judge Grady rendered her decision from the bench, granting Mr. Tobatto a new trial. (68:21-28). The court found that this case was controlled by ***State v. Carter***, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517, a sexual assault case in which a juror revealed that his brother-in-law had also been the victim of sexual assault. When asked if he felt that "would influence or affect [his] ability to be fair and impartial," the juror stated "yes." ***Id.*** ¶ 3. The court of appeals held that the juror was subjectively biased as a matter of law, and that the defendant's attorney's failure to further question a subjectively biased juror, move to strike the juror for cause, or use a peremptory challenge to remove the juror constituted ineffective assistance of counsel. ***Id.*** ¶¶ 12-15.

Judge Grady noted that the juror in ***Carter*** had answered "yes," which was a more unequivocal answer then in this case. (67:21). However, she also noted that the relevant question in this case had been phrased differently than in ***Carter***.

> When you then look to the way that [the prosecutor] asked it:
>
> If you're selected, will you be able to set that experience aside and be a fair and impartial juror.
>
> And I do think that there is some difference in setting it aside or whether it would influence or affect your ability.
>
> And [the prosecutor] asked that and the answer was, basically, I don't know.

(67:22).

Thus, Judge Grady found that Juror No. 10 was subjectively biased and that defense counsel was ineffective for: (1) not asking follow-up questions; (2) failing to move to strike for cause; or (3) failing to use a peremptory challenge against her. (67:26). The court explained its reasoning as follows:

> The question is, is an individual juror either telling us that they are biased in creating their subjective bias or would a reasonable person after hearing those answers and knowing what the juror went through saying, um-hum, they can't; they cannot be fair.
>
> I just don't think that there is a way around that.
>
> So, then when you see that, someone had a duty to act. . . . [Defense counsel] did have that duty and that that failed.
>
> And that by an omission, his specific failure to deal with that juror who, ultimately landed on the jury rendered his actions outside of the reasonable norms.

(67:27-28).

In finding that defense counsel lacked a consistent trial strategy, Judge Grady noted several inconsistencies in his testimony.

> He also stated in one (1) hand that he was convinced by juror 10's demeanor but then later came back in and complimented all of their [(the other jurors who had experiences with domestic violence or harassment)] demeanor or consistency in clarity of the answer.
>
> He talked about how it was his desire to strike these individuals and, yet, quite frankly, some of the individuals that he struck had more clear answers that would indicate there was not a bias.

(67:25).

Judge Grady also noted that it was inconsistent of defense counsel to use a peremptory challenge on Juror No. 21, but not on Juror No. 10, when both jurors had reported domestic violence or harassment experiences, and both had expressed hesitancy with respect to their abilities to be fair and impartial. (67:29).

Accordingly, Judge Grady found that defense's counsel's failure to take steps to remove Juror No. 10 from the panel "was the product of incompetence, not of trial strategy." (67:28). She therefore held that "[t]he only remedy here is a new trial." (67:28).

At a subsequent hearing on January 27, 2015, Judge Grady clarified that it was her finding that trial counsel's deficient performance had, in fact, prejudiced Mr. Tobatto. (69:4-6).

ARGUMENT

I. The Circuit Court Correctly Found that Juror No. 10 was Subjectively Biased.

A. General legal principles and standard of review for claims of juror bias.

A criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial. ***Irvin v. Dowd***, 366 U.S. 717, 722 (1961).

The decision of whether a prospective juror should be struck for cause is left largely to the trial court's discretion. ***State v. Erickson***, 227 Wis. 2d 758, 775, 596 N.W.2d 749 (1999). However, a prospective juror must be struck for cause if the defendant proves that he or she exhibits bias. A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair. *See* ***State v. Krueger***, 2001 WI App 14, ¶¶ 4, 15, 240 Wis. 2d 644, 623 N.W.2d 211. Denial of the right to an unbiased jury is one of those trial errors that is not excused by being shown to have been harmless. ***Gray v. Mississippi***, 481 U.S. 648, 668 (1987).

The requirement that a juror be indifferent is codified in Wis. Stat. § 805.08(1). The statute requires the circuit court to examine on oath each person who is called as a juror to discover if he or she "has expressed or formed any opinion or is aware of any bias or prejudice in the case." The statute

further directs that "if a juror is not indifferent in the case, the juror shall be excused." The Wisconsin Supreme Court has stated that even the appearance of bias should be avoided. ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990).

There are three types of juror bias: statutory,[4] objective,[5] and subjective. ***Faucher***, 227 Wis. 2d at 716. It is the latter form of bias - subjective bias – that Juror No. 10 exhibited in this case.[6]

Subjective bias refers to bias that is revealed through the words and demeanor of the prospective juror during *voir dire*. It refers to the prospective juror's state of mind. ***Id.*** at 717. "This category of bias inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have." ***State v. Kiernan***, 227 Wis. 2d 738, 745, 596 N.W.2d 760 (1999) (citing ***State v. Ferron***, 219 Wis. 2d 481, 498, 579 N.W.2d 654 (1998); ***State v. Delgado***, 223 Wis. 2d 270, 282, 588 N.W.2d 1 (1999)).

On review, this court will uphold the circuit court's factual finding that a prospective juror is or is not subjectively

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[4] The term "statutory bias" refers to those who the legislature has deemed biased because they are related by "blood or marriage to any party or to any attorney appearing in [the] case" and those who "[have] any financial interest in the case." ***Faucher***, 227 Wis. 2d at 717; Wis. Stat. § 805.08(1).

[5] "Objective bias" occurs when a reasonable person in the individual prospective juror's position could not objectively judge the case in a fair and impartial manner. ***Faucher***, 227 Wis. 2d at 718; *see also* ***Erickson***, 227 Wis. 2d at 775.

[6] Mr. Tobatto does not argue that Juror No. 10 was statutorily or objectively biased in this appeal.

biased unless it is clearly erroneous. ***Faucher***, 227 Wis. 2d at 718.

B. Juror No. 10 was subjectively biased.

Here, Judge Grady correctly found that the outcome of this case is controlled by ***Carter***. Accordingly, she rightly determined that Juror No. 10 was subjectively biased.

In both this case and in ***Carter***, the relevant jurors were asked if they could be fair and impartial in light of their personal experiences – experiences involving the same type of conduct that was at issue in the cases. Neither juror was able to give the requested assurance. Instead, they both indicated that their experiences would affect their ability to be fair and impartial. (61:51; ***Carter***, 250 Wis. 2d 851, ¶ 3). This is the very definition of subjective bias.

The State argues that this case is distinguishable from ***Carter***, because there, the prospective juror answered "yes" unequivocally when asked if his relation to a victim of sexual assault "would influence or affect [his] ability to be fair and impartial." (State's Initial Br. at 28). However, although Juror No. 10's answer took a different form, the substance was the same – it was an indication that a past experience "would influence or affect [her] ability to be fair and impartial." *See* ***Carter***, 250 Wis. 2d 851, ¶¶ 3, 12-13. Juror No. 10 was asked if she would "be able to set that experience [as a victim of harassment] aside and be a fair and impartial juror." She responded:

> I don't know if I'll be a hundred percent objective because I had my personal experiences that impact what I believe now as far as the law. I mean, I'm not going to go against what that says, but I know that's for interpretation, as well.

(61:51).

While this answer was more nuanced than a simple "no," at bottom it was the functional equivalent. Juror No. 10 admitted that her experiences "impact[ed] what [she] believe[d]," and as a result, she did not "know if [she] could be a hundred percent objective." Reasonably construed, this was an indication by Juror No. 10 that her experiences would have *at least some* influence or affect on her ability to be fair and impartial. Put another way, it was a statement that she did not think she could be *totally* fair and impartial because of her past experience as a victim of harassment. That is exactly what the juror's answer in ***Carter*** demonstrated – an inability to be totally fair and impartial.[7]

At any rate, even if Juror No. 10's response is more properly characterized merely as an expression of uncertainty about her ability to be fair and impartial (rather than an affirmative indication that she could not be fair and impartial), her remarks still demonstrate that she was subjectively biased. The inability of a juror to give an affirmative assurance that a personal experience will not affect his or her impartiality when specifically asked to do so is no different in substance from an affirmative answer

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[7] As Judge Grady astutely noted, the question immediately preceding Juror No. 10's answer was different than the one in ***Carter***, and this difference rendered the substance of the answers virtually identical. The question in ***Carter*** – "[d]o you feel that that would influence or affect your ability to be fair and impartial" – only required the juror to say whether his experience would have *any* affect on his ability to be fair and impartial; it did not require him to estimate how much. In this case, the question – "will you be able to set that experience aside and be a fair and impartial juror" – asked Juror No. 10 for an assurance that her experience would have *no* affect on her impartiality. Thus, the responses of both jurors indicate the same thing – that their respective past experiences would have *at least some* affect or influence on their ability to be fair and impartial.

admitting that the experience will affect a juror's impartiality. *See* ***Thompson v. Altheimer & Gray***, 248 F.3d 621, 626 (7th Cir. 2001) ("When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases and her prejudicial personal experiences and render a fair and impartial verdict.").[8] When asked if they can be fair and impartial, a juror must be able to give an affirmative assurance of impartiality. A refusal to answer the question or a statement that they "don't know" is insufficient to establish that the juror is impartial.

Subjective bias is not limited to situations where a juror affirmatively states that he or she cannot be fair and impartial. Rather, it "inquires whether the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have." ***Kiernan***, 227 Wis. 2d at 745 (citing ***Ferron***, 219 Wis. 2d at 498; ***Delgado***, 223 Wis. 2d at 282). Similarly, Wis. Stat. § 805.08(1) states that "if a juror *is not indifferent* in the case, the juror shall be excused." It does not say that a juror shall be excused only if they affirmatively express partiality.

Thus, under any reasonable interpretation of Juror No. 10's response, "the record reflects that [she was not] a reasonable person who [was] sincerely willing to set aside any opinion or prior knowledge that [she] might have." *See* ***Kiernan***, 227 Wis. 2d at 745. She was therefore subjectively biased.

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[8] In ***Thompson***, the juror stated, "I can't say that [my background] is not going to cloud my judgment. I can try to be as fair as I can, as I do every day." The court held that the juror's comments demonstrated bias, stating that although "[the juror] said she would *try* to be fair, . . . she expressed no confidence in being able to succeed in the attempt." 248 F.3d at 624, 626.

The State argues that Juror No. 10 was not subjectively biased because she stated only that she did not know if she could be "one hundred percent" objective in light of her past harassment experience. It notes that prospective jurors need not respond to *voir dire* questions with "unequivocal assurances" of impartiality." (State's Initial Br. at 14, 22-23 (citing ***Kiernan***, 227 Wis. 2d at 750, n.10)). However, even though a prospective juror need not give an "unequivocal assurance" of impartiality, that is not to say that they can fail to give *any* assurance of impartiality.

For example, in ***State v. Oswald***, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238, this court upheld a trial court's ruling that two jurors who had failed to give unequivocal assurances of impartiality were not subjectively biased. The offense in ***Oswald*** involved a shootout, which had been recorded and played on television. After admitting that seeing the shootout made her think the defendant was guilty, one of the jurors stated that she "probably" could set this belief aside and judge the case solely on the evidence presented at trial. When asked if he could decide the case based solely on evidence presented in court and not be swayed by the pretrial publicity, the other juror stated "[he] would try to do [his] best." The court of appeals found that the trial court's decision not to strike these jurors was not clearly erroneous, noting that "[t]he trial court is in a much better position than we to determine if a response of 'probably' or 'I'll try' is sincere." ***Id.*** ¶ 19.

Similarly, in ***State v. Jimmie R.R.***, 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196, the court of appeals upheld a trial court's decision not to strike a juror who also gave a less than unequivocal indication of impartiality. ***Jimmie R.R.*** was a sexual assault case. The prospective juror disclosed that his wife had also been the victim of a sexual

assault when she was a young girl. When asked if he could make his decision based on the evidence and the law without being swayed by his wife's experience, the juror responded, "I think I could." Again, the court of appeals stated that the trial judge was in a far better position to evaluate the juror's conduct, demeanor, tone of voice, and other nonverbal cues in considering whether the juror exhibited subjective bias. Giving due deference to the trial court's better position, the court of appeals concluded his decision to retain the juror was not clearly erroneous. ***Id.*** ¶ 29.

This case is distinguishable from ***Oswald*** and ***Jimmie R.R.*** In both those cases, the prospective jurors gave an assurance that they could be fair and impartial, albeit somewhat equivocally. Here, Juror No. 10 gave *no* assurance of impartiality when asked if she could set her experience as a victim of harassment aside and be a fair and impartial juror. She did not say she could "probably" be fair and impartial. She did not say "I think I could" be fair and impartial. She did not even say she would "try" to be fair and impartial. Instead, Juror No. 10 said,

> I don't know if I'll be a hundred percent objective because I had my personal experiences that impact what I believe.

Thus, this case is like ***United States v. Martinez-Salazar***, 528 U.S. 304 (2000). There, a prospective juror was asked "whether, if he were a defendant facing jurors with backgrounds and opinions similar to his own, he thought he would get a fair trial." The juror responded, "I think that's a difficult question. *I don't think I know the answer to that*." ***Id.*** at 308 (emphasis added). And when asked whether he "would feel more comfortable erring on the side of the prosecution or the defense," he said he "would probably be more favorable to the prosecution." ***Id.*** When the judge then

scolded him for reversing the presumption of innocence, the juror said, "I understand that *in theory*." ***Id.*** (emphasis added). The judge nevertheless refused to excuse the juror for cause. ***Id.*** at 309. The Supreme Court found that under these circumstances, the judge had erred in not granting a challenge for cause.[9]

The State also argues that Juror No. 10's "assurance that she would follow the law" showed that she was not subjectively biased. (State's Initial Br. 23). However, this argument overlooks that the fact that right after saying that she would not "go against what [the law] says," Juror No. 10 stated that she believed the law was open "for interpretation."

> I mean, I'm not going to go against what [the law] says, but I know that's for interpretation, as well.

Moreover, just before making this statement, Juror No. 10 stated that she did not know if she could be one hundred percent objective because of her experience as a victim of harassment. Thus, her statement that she believed the law was open "for interpretation" begged the obvious question: would she interpret the law against Mr. Tobatto because she had been the victim of the same type of crime that he was accused of committing? Thus, rather than showing impartiality as the State suggests, Juror No. 10's statement

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[9] In ***Martinez-Salazar***, the defendant used a preemptory challenge to strike the juror after the district court refused to strike him for cause. On appeal, he argued that the court's error violated his right to the full complement of peremptory challenges to which he was entitled. The government did not contest that the district court abused its discretion in refusing to strike the juror, but argued that the error did not violate the defendant's peremptory challenge rights. The Supreme Court agreed, stating that "the District Court's for-cause mistake" did not compel the defendant to challenge the juror peremptorily. 528 U.S. at 315.

that she believed the law was open for interpretation further demonstrated her subjective bias.

Thus, Judge Grady correctly found that Juror No. 10 was subjectively biased. This was one of the rare situations where a prospective juror's explicit admission, rather than her demeanor, demonstrated her subjective bias as a matter of law. *See* ***Carter***, 250 Wis. 2d 851, ¶ 9.

C. Judge Grady's finding of subjective bias is entitled to deference.

As noted in the previous section, Judge Grady correctly determined that Juror No. 10 was subjectively biased. Nevertheless, even if this court were to disagree with that conclusion, it still should not substitute its judgment for that of the circuit court. On review, an appellate court must uphold a circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous. ***Faucher***, 227 Wis. 2d at 718. Here, Judge Grady's determination was not clearly erroneous.

The State, however, argues that Judge Grady never actually made the threshold determination that Juror No. 10 was subjectively biased. (State's Initial Br. at 17). This argument is specious. In her oral ruling, Judge Grady stated:

> The question is, is an individual juror either telling us that they are biased in creating their subjective bias or would a reasonable person after hearing those answers and knowing what the juror went through saying, um-hum, they can't; they cannot be fair.
>
> I just don't think that there is a way around that.
>
> So, then when you see that, someone had a duty to act. . . . [Defense counsel] did have that duty and that that failed.

(67:27-28).

This was an explicit finding of subjective bias. Moreover, the finding was also implicit in Judge Grady's conclusion that trial counsel was ineffective for failing to act to remove Juror No. 10. Had Judge Grady not found Juror No. 10 to be biased, she logically could not have found that counsel was ineffective for failing to take steps to remove her. Moreover, subjective bias was the whole basis underlying the ruling in ***Carter*** that the attorney in that case was ineffective. It is illogical to suggest that Judge Grady did not find Juror No. 10 to be subjectively biased, given that her ruling was based in large part on the court's reasoning in ***Carter***.

Next, the State argues that this court should give no deference to Judge Grady's determination, because Judge Triggiano, not Judge Grady, presided over the *voir dire* proceedings. (State's Initial Br. at 16-17). The State even goes a step further and asserts that Judge Triggiano's failure to strike Juror No. 10 *sua sponte* was actually an "implicit finding of no subjective . . . bias." (State's Initial Br. at 16). The State therefore claims that deference is owed to Judge Triggiano's implicit findings, not to Judge Grady's actual finding.

Contrary to the State's claim, Judge Triggiano did not make a finding that Juror No. 10 was unbiased. The issue of Juror No. 10's impartiality was never raised before Judge Triggiano. No motion to strike or objection was ever made regarding Juror No. 10. And Judge Triggiano never ruled or commented on Juror No. 10's partiality. The absence of a *sua sponte* strike for cause is not the equivalent of an affirmative finding that the juror is impartial. It is exactly what it appears to be – the absence of a judicial finding.

A nonexistent finding provides no basis for this court to give deference. *See* ***State v. Williams***, 2000 WI App 123,

¶ 20, 237 Wis. 2d 591, 614 N.W.2d 11 (quoting ***State v. Brunette***, 220 Wis. 2d 431, 440-42, 583 N.W.2d 174 (Ct. App. 1998)) (Appellate review "of a juror bias claim is severely hampered when we are deprived of 'the contemporaneous impressions of the trial court and its reasoning' on a question of juror bias.").

Instead, this court should defer to Judge Grady's actual finding of subjective bias. The State fails to cite any cases which hold that no deference should be given on review of a subjective bias determination simply because the trial judge did not preside over the *voir dire* proceedings. To the contrary, the case law is clear that a "trial court's determination of subjective bias will be upheld unless clearly erroneous." *See, e.g.,* ***Faucher***, 227 Wis. 2d at 718, ***Kiernan***, 227 Wis. 2d at 745, ***Oswald***, 232 Wis. 2d at 110, ***Jimmie R.R.***, 232 Wis. 2d at 148.

Accordingly, this court should review Judge Grady's determination that Juror No. 10 was subjectively biased under the clearly erroneous standard. And under that standard, her decision should be upheld as a reasonable exercise of discretion.

II. The Circuit Court Correctly Found that Mr. Tobatto's Trial Attorney was Ineffective, and Prejudicially so, for Failing to Seek the Removal of Juror No. 10 from the Panel.

A. General legal principles and standard of review for claims of ineffective assistance of counsel.

A defendant seeking a new trial on the grounds of ineffective assistance of counsel bears the burden of showing that his trial counsel's performance was both deficient and that he suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***,

153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A failure to object or to further question a juror may be raised as a claim of ineffective assistance of counsel. ***State v. Williams***, 2000 WI App 123, ¶ 21, 237 Wis. 2d 591, 614 N.W.2d 11.

To establish deficient performance, the defendant must show "facts from which a court could conclude that counsel's representation was below the objective standard of reasonableness." ***State v. Wesley***, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232.

"To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined." ***Id.***

Whether trial counsel's actions constitute ineffective assistance presents a mixed question of fact and law. ***State v. Koller***, 2001 WI App 253, ¶ 10, 248 Wis. 2d 259, 635 N.W.2d 838. This court will not reverse the trial court's factual findings regarding counsel's actions unless those findings are clearly erroneous. ***Id.***; *see also* Wis. Stat. § 805.17(2). Whether trial counsel's performance was deficient, and whether that behavior prejudiced the defense, are questions of law that this court reviews *de novo*. ***State v. Trawitzki***, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801.

B. Trial counsel performed deficiently in failing to act to remove Juror No. 10.

An attorney's failure to act to remove a subjectively biased juror who ultimately sits on the jury constitutes deficient performance. ***Carter***, 250 Wis. 2d 851, ¶ 15. In ***Carter***, the defense attorney explained at the ***Machner*** hearing that he did not challenge the juror because he believed that she could be fair and impartial. Counsel

reached this conclusion by relating the juror's experience to his own. In this regard, he stated:

> From my own personal experience, which I thought of at the particular time, was I was told by my mother just within a few years that a sister-in-law had been sexually assaulted as a child, I believe. And judging from that experience and the effect that had on me, I did not think that would result in someone-would affect someone's ability to be fair and impartial because something occurred before-to someone before they knew them and were somehow related to them by marriage.

Id. ¶ 4.

The attorney's conclusion in ***Carter*** that the juror would not be biased rested also on the juror's earlier general assurances that he could be fair and impartial. ***Id.*** ¶ 5. However, as the ***Carter*** court noted, that occurred before the questioning about the juror's experience with sexual assault victims. When specifically asked whether his experience would influence or affect his ability to be fair and impartial in the case, the juror answered yes. ***Id.***

Moreover, the ***Carter*** court noted that the defense attorney had failed to further question the juror's statement of admitted bias. He also failed to move to strike the prospective juror for cause or use a peremptory challenge to remove him from the jury panel. The court held that these failures constituted deficient performance. ***Id.*** ¶ 15.

In this case, as in ***Carter***, defense counsel failed to further question Juror No. 10 about her admitted inability to be fair and objective. He also failed to move to strike her for cause or use a peremptory challenge against her. While he stated at the ***Machner*** hearing that Juror No. 10 had stated that she would "be fair and impartial the best she could,"

Juror No. 10's only assurance that she did not carry any bias or prejudice came in response to the prosecutor's general question posed to all the prospective jurors. (61:18). However, that occurred before her questioning about her experience as a victim of harassment. When specifically asked whether she could set that experience aside and be fair and impartial, Juror No. 10 stated she was not sure if she could do so.

Moreover, as Judge Grady determined, counsel's failure to act to remove Juror No. 10 was a matter of incompetence, not trial strategy. As an initial matter, the notion that there could even be a reasonable strategic reason for wanting to keep a subjectively biased juror on the panel is suspect. What strategic reason could there possibley be for a defense attorney to want to retain a juror who is biased against the defendant, especially when that bias stems from being a victim of the very type of offense the defendant is accused of committing?

Trial counsel's testimony bears this out. At the ***Machner*** hearing, he testified that his initial impression of Juror No. 10 was that she would "be a good juror for our case." He elaborated as follow:

> A. Um, I thought she would be a good juror for our case.
>
> Q. And why did you think that, sir?
>
> A. She seemed logical and not – not emotional about the issues when she answered, rather straightforward and confident.
>
> Q. When – Let me back up. Was [Juror No. 10] one of the jurors who said she had a prior situation involving harassment?

A. I believe she did.

Q. Okay. And when she said that, did that give you pause at all?

A. It did. But then, from her demeanor, it didn't seem like she was upset by it, and I believe she said that she would follow up, be fair and impartial the best she could.

(67:17-18).

Thus, despite the fact that Juror No. 10 expressed doubt about her ability to be fair and impartial because of a past experience with harassment, trial counsel purported to have concluded that she would be a good juror in a harassment case because, according to him, (1) she stated she would be fair and impartial; and (2) she seemed non-emotional, straightforward, and confident.

This opinion falls below an objective standard of reasonableness. First, it was based on the incorrect belief that Juror No. 10 stated that she could be fair and impartial in response to follow-up questions about her experience as a victim of harassment. In addition, counsel's testimony regarding his opinion about the jurors' demeanors was contradictory. Again, he stated that he based his conclusion regarding Juror No. 10 on his assessment of her demeanor – that she was not emotional, straightforward and confident. However, he also testified that the other prospective jurors who had past experiences with harassment/domestic violence exhibited non-emotional behavior and appeared confident.

Q. Now, as it pertains to the issues that have been raised on appeal today for the judge to decide, [defense counsel], is there a reason why you didn't ask follow-up questions along those same

lines to those seven[10] prospective jurors who answered yes to the harassment question, or not?

A. I didn't think it was necessary after his – after his questioning.

Q. And why didn't you think it was necessary, sir?

A. I believe they all said they would be fair and impartial, *and I didn't note any strange behavior or crying or anything like that*.

Q. When you hear their answers, are you also listening – or watching their body language?

A. Yes.

Q. Okay, And based on their body language and heir answers, did you feel it was necessary to ask follow-up questions along those same lines?

A. No. I thought they – those jurors all seemed confident in their answers.

(67:12-13 (emphasis added)).

Later, however, when asked why he did not strike Juror No. 10, but instead struck other jurors (all but one of whom were among the nine jurors who had experienced harassment or domestic violence), he flip-flopped and stated it was because those other jurors were "emotional" and "not confident in their answers."

Q. And the cases that you struck jurors with a peremptory strike, did you find their demeanor was any different than the demeanor of Juror Number 10, who eventually sat on you jury?

[10] The prosecutor did not include Juror Nos. 27 and 28 in his count.

A. Right. They may have seemed more emotional to me about the issues and not as confident in their answers.

(67:20).

Trial counsel's testimony regarding his observations of the jury members' demeanor is contradictory and thus not credible. On the one hand, he claimed that the jurors with harassment or domestic violence-related issues displayed the same non-emotional demeanor and confidence to the point that he did not think it necessary to ask follow-up questions of any of them. Yet on the other hand, he claimed that some of those jurors were emotional and not confident when explaining why he removed those jurors and not Juror No. 10. Counsel cannot have it both ways. The contradictory nature of his testimony demonstrates counsel did not have a strategic reason for failing to take steps to remove Juror No. 10.

Moreover, counsel's failure to take steps to remove Juror No. 10 was inconsistent with own stated jury selection strategy. Counsel testified that because Mr. Tobatto was charged with harassment/domestic violence-related crimes, he wanted to ask potential jurors about any harassment or domestic violence-related incidents they may have experienced. He also said it was his goal to rank the prospective jurors who had domestic violence-related issues, and try to exclude the ones who were the most prejudicial to Mr. Tobatto.

Q: . . . As part of your preparation for trial, did your preparation also involve thoughts, consideration about how you wanted to conduct your jury selection, sir?

A: Correct. Since it was a domestic violence related case, there are a number of questions I

> asked or I would ask about if jurors or potential jurors had domestic violence issues themselves or relationship issues.

(67:7).

> Q: So, if I could, based on what you just testified, you – you ranked all of the potential jurors who identified themselves as victims of domestic violence and determined who were the most prejudicial to Mr. Tobatto; is that correct?
>
> A: The best I could at the time.

(67:40).

Despite this stated strategy, counsel did not ask Juror No. 10 any follow-up questions about her experience as a victim of harassment or her statement indicating that she could not be fair and impartial as a result of that experience. Nor did he make any attempt to remove her from the jury. Instead, he claimed to conclude that Juror No. 10 was "a good juror for" a case where Mr. Tobatto was charged with stalking and violating a harassment restraining order. No reasonable attorney would have come to that conclusion, as Juror No. 10 was biased as a result of having been a victim of harassment.

C. Mr. Tobatto was prejudiced by his attorney's deficient performance.

In the context of a claim that an attorney was ineffective for failing to act to remove a biased juror, prejudice is shown by demonstrating that counsel's performance resulted in the seating of a biased juror, not that a differently composed jury would have acquitted the defendant. ***State v. Koller***, 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838; ***State v. Traylor***, 170 Wis. 2d 393, 400-01, 489 N.W.2d 626 (Ct. App. 1992); *see also* ***State v.***

Lindell, 2001 WI 108, ¶ 81, 245 Wis. 2d 689, 629 N.W.2d 223.

Here, the record demonstrates that Juror No. 10 was not a reasonable person who was sincerely willing to set aside any opinion or prior knowledge that she might have had. When asked if she could set her personal experiences aside and judge the case fairly and impartially, she indicated that she did not know if she could do that – she stated she did not know if she could be one hundred percent objective because of past harassment experience. Her explicit admission thus demonstrated her subjective bias.

Despite this, defense counsel took no steps to try to remove Juror No. 10 from the panel. He did not further question her about her admitted bias. He did not move to strike her for cause. And he did not use a peremptory challenge to remove her from the jury panel. These failures resulted in the seating of a biased juror in Mr. Tobatto's case.

A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair. *See* ***Krueger***, 240 Wis. 2d 644, ¶¶ 4, 15. Consequently, counsel's failure to act to remove Juror No. 10, who ultimately sat on the jury, constituted deficient performance resulting in prejudice to Mr. Tobatto. As Judge Grady correctly decided, "[t]he only remedy here is a new trial." (67:28).

CONCLUSION

For these reasons, Mr. Tobatto respectfully requests that this court affirm the order of the circuit court granting his postconviction motion and remand the case for a new trial.

Dated this 16th day of July 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,661 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of July 2015.

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