STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP254-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TODD BRIAN TOBATTO,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MARY TRIGGIANO PRESIDING AT TRIAL, THE HONORABLE LINDSEY GRADY, PRESIDING AT THE POSTCONVICTION STAGE

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

TOBATTO FAILED TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO PROVE THAT PROSPECTIVE JUROR NO. 10 WAS SUBJECTIVELY BIASED.

A. Tobatto Failed To Prove Subjective Bias And Concedes There Was No Objective Bias.

Tobatto challenges his trial attorney's decision not to move to strike for cause, or exercise a peremptory strike against, prospective Juror No. 10, Sarah Aragon,[1] because she was subjectively biased against him. Tobatto's brief at 11 ("It is the latter form of bias – subjective bias – that Juror No. 10 exhibited in this case"); *id.* at n.6 ("Mr. Tobatto does not argue that Juror No. 10 was statutorily or objectively biased in this appeal.").

This leaves but one issue: whether Tobatto proved that Juror No. 10 was not a reasonable person who was sincerely willing to set aside any bias she might have had.

> Here we must ask whether the prospective juror demonstrated subjective bias. "[S]ubjective bias refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." *State v. Faucher,* 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). "A prospective juror is subjectively biased if the record reflects that the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juor might have." *Oswald*, 232 Wis. 2d 62, ¶ 19[, 606 N.W.2d 207]. The circuit court is in the best position to determine whether subjective bias exists, so "we will uphold the circuit court's factual finding that a prospective juror is or is

[1] Throughout the remainder of this brief, the state will refer to Sarah Aragon as "Juror No. 10."

> not subjectively biased unless it is clearly erroneous." *State v. Lindell,* 2001 WI 108, ¶ 36, 245 Wis. 2d 689, 629 N.W.2d 223.
>
> Excusing jurors for bias is proper if the juror is unreasonable and unwilling to set aside preconceived opinions or prior knowledge. *Oswald,* 232 Wis. 2d 62, ¶ 19[, 606 N.W.2d 207].

State v. Williams, 2015 WI 75, ¶¶ 79-80 (July 10, 2015). *See* State's opening brief at 14-15.

Tobatto insists that, just because Juror No. 10 acknowledged that she had been harassed by a boyfriend after a past breakup, she was not a reasonable person who was sincerely willing to set aside that experience; and nothing in her answers during voir dire overcame her bias. Tobatto's brief at 12-18.

Tobatto fails to take into account the highly deferential standards for review of: (a) Judge Triggiano's decision not to *sua sponte* strike Juror No. 10 for cause based on the judge's implicit finding from her answers and demeanor that she was not subjectively biased; and trial counsel's presumptively reasonable strategic decision not to remove her from the final panel because counsel believed from her answers and demeanor that she was a reasonable person who would sincerely try to set aside any biases she may have had. *See* cases cited in the State's initial brief at 11-16.

Tobatto fails to acknowledge that Juror No. 10 was presumed as a matter of law not to be biased and it was his burden to prove that she was biased. *See* cases cited in the State's initial brief at 13. Tobatto fails to acknowledge that determining whether Juror No. 10 was subjectively biased depended on her verbal responses and observed demeanor at voir dire. "These observations are best within the province of the circuit court." *State v. Kiernan,* 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999). Here, the pertinent observations of Juror No. 10 were made by defense counsel and by Judge

Triggiano at voir dire, who found no subjective bias, and not by postconviction Judge Grady, who found subjective bias, and then only implicitly so, from a cold transcript. "Even with a transcript, an appellate court is at a disadvantage to gauge subjective bias because the demeanor and sincerity of the juror are difficult to convey in the paper record of a proceeding." *Kiernan,* 227 Wis. 2d at 746 (citation omitted); *See State v. Williams*, 2002 WI 1, ¶ 34, 249 Wis. 2d 492, 637 N.W.2d 733.

Tobatto fails to take into account what Juror No. 10 said during voir dire. Juror No. 10 knew from the outset that the whole point of voir dire was to ensure that the jurors selected for trial would remain fair and impartial (61:11). In response to the trial court's question of the whole panel, Juror No. 10 assured the court (by not answering "no") that she would give Tobatto the presumption of innocence (61:13), and that she did not carry any bias or prejudice into this case (61:18). In response to the prosecutor's question of the whole panel, Juror No. 10 assured everyone (by not answering "no") that she would follow the court's instructions (61:40-41). Juror No. 10 had no advance knowledge of this case and had no connection with any of the parties or witnesses. This puts into proper context, and renders far less concerning than it otherwise might have been, her later response to the prosecutor's question specifically directed to Juror No. 10 that she would follow the law but did not "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) (emphasis added).

Juror No. 10 was correct: her sincere assurance that she would follow the law was "for interpretation as well." It was for interpretation by the trial court and by defense counsel from her answers and demeanor. Neither the court nor counsel interpreted her answers to the general and specific questions, and her demeanor when answering those questions, as demonstrating that she was an unreasonable

person unwilling or unable to set aside her bias and be a fair and impartial juror. Finally, Juror No. 10's equivocation did not render her subjectively biased as a matter of law. *See* the State's initial brief at 14-15.

B. Judge Grady's Implicit Finding Of Subjective Bias Is Either (A) Not Entitled To Deference Here; Or (B) Clearly Erroneous.

Tobatto is wrong when he argues that Judge Grady's implicit finding that Juror No. 10 was subjectively biased is subject to deferential review under the "not clearly erroneous" standard. Tobatto's brief at 18. Judge Grady's decision is owed no deference because she was in no better position than this court to make that factual determination. Like this court, Judge Grady did not see or hear Juror No. 10. Judge Triggiano and defense counsel did. The decisions of the latter two only are owed "not clearly erroneous" deference here. *See State v. Erickson,* 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999); *State v. Oswald,* 2000 WI App 2, ¶ 22, 232 Wis. 2d 62, 606 N.W.2d 207; *State v. Jimmie R.R.,* 2000 WI App 5, ¶ 29, 232 Wis. 2d 138, 606 N.W.2d 196. *See also Williams,* 249 Wis. 2d 492, ¶ 34; *Phelps v. Physicians Ins. Co. of Wisconsin, Inc.,* 2009 WI 74, ¶¶ 71-72, 319 Wis. 2d 1, 768 N.W.2d 615 (and cases cited at ¶ 72 n.1) (Bradley, J., dissenting).

Even assuming it is reviewed under the "not clearly erroneous" standard, Judge Grady's implicit finding of subjective bias was also clearly wrong because it was not based on fact. Tobatto failed to present either an affidavit or testimony from Juror No. 10 at the postconviction hearing admitting her subjective bias against him because of her experience with her ex-boyfriend. Tobatto proved the

experience, but not the bias. *See State v. Koller,* 2001 WI App 253, ¶ 15, 248 Wis. 2d 259, 635 N.W.2d 838. *See also* State's initial brief at 28-29.[2]

Tobatto did not in the trial court, and does not here, offer any evidence of subjective bias beyond the mere fact that Juror No. 10 admitted she was harassed by her ex-boyfriend in the past. The mere fact that she was a past victim of domestic harassment did not disqualify her from serving on Tobatto's jury. *See* cases cited in the State's initial brief at 19-22. It did not, without more, make Juror No. 10 an unreasonable person unwilling to set aside her admitted bias.

In conceding that Juror No. 10 was not objectively biased, Tobatto necessarily concedes that a reasonable person in her position objectively could have set her bias aside and judged this case in a fair and impartial manner. *State v. Mendoza,* 227 Wis. 2d 838, 850, 596 N.W.2d 736 (1999). If a reasonable person in Juror No. 10's position objectively could set aside the bias she candidly admitted to and decide this case fairly and impartially, it necessarily follows that she was not an unreasonable person unwilling to set that bias aside. Every indication is that

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[2] Judge Grady was unwilling to find that her colleague (Triggiano) erred. But, by holding that trial counsel was ineffective for not removing a subjectively biased juror, Judge Grady necessarily also held that: (a) Juror No. 10 was subjectively biased and, so, (b) Judge Triggiano erred by allowing a subjectively biased juror to serve on the jury. With or without a defense motion to strike, if Juror No. 10's subjective bias should have been obvious to any reasonably competent defense attorney, it should have been equally obvious to a reasonably competent judge. *See* State's initial brief at 18-19. Judge Triggiano was, after all, not hesitant to *sua sponte* strike other prospective jurors for cause in this case (61:72; 62:62; 63:60-61, 67-68). Unlike Judge Grady's implicit finding of subjective bias, Judge Triggiano's implicit finding of no subjective bias on Juror No. 10's part based on her answers and demeanor at voir dire was not clearly erroneous.

Juror No. 10 was willing to set aside any bias as best as she could, and a reasonable person in her position would have been able to do so. A reasonable defense attorney, in turn, could have reasonably relied on that assurance.

Tobatto failed to present clear and convincing proof to overcome the dual presumptions that Juror No. 10 was not biased and that trial counsel acted reasonably in believing Juror No. 10's assurances that she would sincerely try to follow the law. *State v. Funk,* 2011 WI 62, ¶ 63, 335 Wis. 2d 369, 799 N.W.2d 421; *State v. Smith,* 2006 WI 74, ¶ 19, 291 Wis. 2d 569, 716 N.W.2d 482 (citing *State v. Louis,* 156 Wis. 2d [470], 478, 457 N.W.2d 484 [(1990)]).

C. The Wisconsin Supreme Court's Recent Decision In *State v. Williams* Supports The State's Argument That Tobatto Failed To Prove Prejudice Because He Failed To Prove That His Attorney Left A Subjectively Biased Person On The Jury.

In *State v. Williams,* 2015 WI 75, prospective jurors were told during voir dire at a double homicide trial that they would have to view bloody crime scene and autopsy photographs. Several prospective jurors expressed discomfort at having to do so and were individually questioned about it. *Id.* ¶¶ 17-19. Prospective Juror No. 12 was specifically asked whether his discomfort at having to view the photographs would affect his deliberations. He answered: "Really hard to say. I don't know if I would have a bias or not." When the court followed this answer up with a question whether his discomfort would impair his ability to render a fair and impartial verdict, Juror No. 12 answered "that he thought he would be a little biased." In response to follow-up questions by defense counsel, Juror No. 12 said that viewing the photographs "would make him feel sympathy for the victims." *Id.* ¶ 20. Defense counsel did not

move the court to strike Juror No. 12 for cause and did not exercise a peremptory strike against him. Juror No. 12 remained on the jury of twelve that found Williams guilty of the double homicides. *Id.* ¶ 21.

Williams argued that his attorney was ineffective for not, either with a motion to strike for cause or with a peremptory strike, removing Juror No. 12 from the jury. The Wisconsin Supreme Court held that Williams failed to prove prejudice because he failed to prove that Juror No. 12 was subjectively biased against him. *Id.* ¶¶ 76-77, 83. Even though Juror No. 12 said that viewing the photographs might render him biased and cause him to have sympathy for the victims, this did not in the eyes of the court render him subjectively biased. His answers reflected Juror No. 12's attempt, "to articulate his preference not to view victim photographs, and explained that viewing the photographs might make him feel sympathy for the victims." *Id.* ¶ 81. "Moreover, after being advised that photographic evidence of the victims would be presented, the jurors were specifically asked whether any of them would be unable to render an impartial decision, and Juror No. 12 did not come forward." *Id.* Because Williams failed to prove that Juror No. 12 was biased against him, he failed to prove prejudice caused by counsel's decision not to have Juror No. 12 removed from the panel. *Id.* ¶ 83.

The circumstances presented here are similar to those presented in *Williams*. Juror No. 10 assured the court, by not indicating otherwise in response to its questions of all prospective jurors, that she carried no biases into this case, she would give Tobatto the presumption of innocence and she would remain fair and impartial. Juror No. 10 then assured the prosecutor that she would follow the law and believed, but was not "one hundred percent certain," that her experience with her ex-boyfriend would not interfere with her ability to be fair and impartial. Counsel

believed, based on her answers and demeanor, that Juror No. 10 would remain fair and impartial, and would follow the law, despite her equivocation. Tobatto failed to prove that counsel was wrong. Tobatto failed to prove prejudice.

The facts of this case are far closer to those in *Williams* than to the facts in *State v. Carter,* 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517, upon which both Tobatto and Judge Grady so heavily relied in second-guessing trial counsel's decision not to remove Juror No. 10. Tobatto's brief at 12. Unlike here or in *Williams,* the prospective juror in *Carter* openly admitted his subjective bias against the defendant in a sexual assault trial when he said he believed he could not be fair and impartial because his brother-in-law was a sexual assault victim. There was no equivocation. Defense counsel failed to have this admittedly biased juror removed from the final panel. *Id.* ¶¶ 3, 8, 15.

D. The Law Required That Juror No. 10 Be Reasonable And Make A Sincere Effort To Set Aside Any Bias. Counsel Reasonably Relied On Her Sincere Assurance That She Would Do So.

Tobatto is simply wrong in arguing that Juror No. 10 was subjectively biased as a matter of law unless she could guarantee that she would be "*totally* fair and impartial." Tobatto's brief at 13 (emphasis added). The law allowed for some equivocation on her part. *Erickson,* 227 Wis. 2d at 776-77; *Jimmie R. R.,* 232 Wis. 2d 138, ¶ 28. *See* cases cited in the State's initial brief at 14-15, 19-23. *See also Williams,* 2015 WI 75, ¶ 20 ("Really hard to say. I don't know if I would have a bias or not.").

Tobatto failed to prove prejudice because he failed to prove that a subjectively biased juror served on the jury that found him guilty. *Koller* 248 Wis. 2d 259, ¶¶ 14-15. *See* State's initial brief at 27-29. The law did not require that Juror No. 10 express one hundred percent certainty that she could remain fair and impartial despite her negative

experience with her ex-boyfriend. It only required her assurance of a sincere effort to be fair and impartial despite that experience. She gave that assurance. Because Tobatto concedes that Juror No. 10 was not objectively biased, it follows that he failed to prove that she was subjectively biased. Therefore, he failed to prove prejudice from trial counsel's decision to keep her on the jury.

The only way Tobatto can prove deficient performance is if this court agrees with his bald assertion that defense counsel's postconviction hearing testimony explaining under oath why he did not strike Juror No. 10 was "not credible." Tobatto's brief at 26. The problem here, however, is that Judge Grady made no such finding. *See* the State's initial brief at 27. Judge Grady simply did not like counsel's strategic decision to keep Juror No. 10 on the jury. Like Tobatto, Judge Grady apparently thought it would have been better strategy to keep off the jury *every* prospective juror who had some experience with domestic abuse. It was, however, outside Judge Grady's purview to second-guess counsel's presumptively reasonable strategic call with the aid of 20-20 hindsight. *See* the State's initial brief at 23-27. *See also Strickland v. Washington,* 466 U.S. 668, 690 (1984); *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009). That hindsight was especially faulty given that defense counsel saw and heard Juror No. 10 at voir dire, as did Judge Triggiano, but Judge Grady did not.

The record plainly shows that Juror No. 10 was a reasonable person willing to set aside her admitted bias. At the very least, a reasonable trial judge could so determine and not strike her *sua sponte* for cause; and a reasonable defense attorney could believe Juror No. 10's sincere assurance that she would try to remain fair and impartial. Tobatto failed to prove either deficient performance or prejudice.

CONCLUSION

Therefore, for the reasons set forth above and in its opening brief, the State of Wisconsin respectfully requests that the circuit court's order granting a new trial be REVERSED.

Dated at Madison, Wisconsin this 3rd day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,965 words.

Dated this 3rd day of August, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 3rd day of August, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General