STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2022AP2124-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD LEO MATHEWSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE BEAU LIEGEOIS, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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INTRODUCTION

While every criminal defendant maintains the right to a fair and impartial jury, *subjective* juror bias claims are difficult to prove unless a potential juror reveals, through her words or demeanor, that she cannot be unbiased. One juror who served at Defendant-Appellant Richard Leo Mathewson's trial expressed initial concern that she had a bias or prejudice in the outcome of his case, but she went on to clarify that she was merely troubled by the nature of the charge: a child sexual assault. When questioned further, she reiterated over and over that she would do her best to listen to the evidence and instructions provided, and the circuit court declined to excuse her for cause because it found from her responses and demeanor that she understood her duty do so. Because Mathewson has not established that the court's finding was clearly erroneous, this Court must affirm.

ISSUE PRESENTED

Was Juror Hilscher subjectively biased, requiring her removal from the jury that served at Mathewson's trial?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are developed in the parties' briefs, and the issues presented involve application of well-established principles to the facts presented.

STATEMENT OF THE CASE

Accused of rubbing the breasts, vagina, and buttocks of his neighbor's niece, who he regularly directed to sit on his lap when she was between eight and ten years old, (R. 2:2–5), Mathewson proceeded to a jury trial on a single count of repeated sexual assault of a child, (R. 104).

At voir dire, informed only of the charge Mathewson faced and the anticipated trial witnesses, several prospective jurors raised their hands when asked, "Does anyone feel that they have any feelings of bias or prejudice based on what you know so far?" (R. 103:16–20.) Despite being instructed on the presumption of innocence and the State's burden of proof, some prospective jurors definitively answered that he or she could not be fair, impartial, and unbiased, and the court individually questioned each of those jurors in chambers. (R. 103:21–23.)

After further inquiry, the court elected to excuse a potential juror who claimed that she could not "stomach the evidence," that her "emotions would be too high," and that she did not think she could be unbiased if a victim began crying during her testimony. (R. 103:25–27.)

Another potential juror was excused after he decisively stated that he could not satisfy his civic duty to be a fair, impartial juror and set aside his childhood experience relating to a friend who was "hurt" by a different man of Mathewson's stature and stated, "[I]t is very hard for me to not look at this case and presume guilt." (R. 103:28–30.)

The court removed another potential juror who grew increasingly emotional during questioning and agreed that, despite that same civic duty, she could not fairly evaluate the facts and ignore her biases or prejudices gained from an unidentified life experience. (R. 103:30–31.)

That was not the only potential juror who became emotional after discussing sexual abuse; a self-identified abuse survivor was released after she described the anxiety she was already experiencing before the trial and admitted that she had not stopped shaking since she learned about the nature of the case. (R. 103:38–43.)

Finally, the court excused the father of two young daughters who acknowledged that he did not feel he could be fair and impartial, disclosed that he "would be biased no matter what," and admitted that he would lean toward finding Mathewson guilty "if there were any evidence at all." (R. 103:45)

After questioning those prospective jurors in chambers, the court returned to ask the remaining panel, "[D]oes anybody have a feeling of bias or prejudice in the outcome of this case?" (R. 103:16, 56.) Juror Hilscher raised her hand. (R. 103:56.) Trying to get to the root of Juror Hilscher's concerns, the court explained both the burden of proof and presumption of innocence before asking, "[W]ould you be able to be fair, impartial, and unbiased as a juror?" (R. 103:56.) Juror Hilscher answered, "I honestly don't know." (R. 103:56.)

Next, Juror Hilscher, the prosecutor, defense counsel, and Mathewson retired to the court's chambers to discuss her answer. (R. 103:56.) There, the presiding judge further educated her on the burden of proof and presumption of innocence before asking if she could "sit as a juror, listen to the evidence, evaluate it, and make a decision on the facts at the end." (R. 103:57.) Juror Hilscher responded, "Like I said, I honestly don't know. When I hear sexual assault of a child, it breaks my heart." (R. 103:57–58.) When the court pushed further, asking Juror Hilscher if she could listen to instructions and apply them to evidence presented in court, she answered, "Yeah. I know what you are saying, but I don't know. I don't know if I could." (R. 103:58.)

The prosecutor subsequently inquired into whether Juror Hilscher could "set aside" her "dislike for the notion of sexual assault and try to listen to the facts and make a determination about whether that actually did happen in this case," and she answered, "I could try. I could try." (R. 103:58–59.) When the court and the prosecutor both continued to ask Juror Hilscher whether she could listen to instructions and apply them to evidence she heard in court, Juror Hilscher answered, "I'll try." (R. 103:60.) And when the court advised Juror Hilscher that she would be required to do so if selected, she repeatedly responded, "I'll do my best." (R. 103:60.)

Defense counsel eventually asked that Juror Hilscher be removed for cause, citing his concern that "she seemed to start from the premise that sexual assault damages lives and that's why she would have a hard time maybe following the directions" and that she was potentially "presuming guilt." (R. 103:61.) The prosecutor opposed that request, pointing out that Juror Hilscher affirmed that she would try and "do her best," that her indecisiveness was born at least, in part, from not yet knowing the facts of the case, and that her feelings involved more of a dislike toward sexual assault that virtually everyone shared. (R. 103:61–62.)

The court ultimately denied defense counsel's request to remove Juror Hilscher, noting that "she underst[ood] the obligation of serving as a juror and that she's required to follow the judge's instructions." (R. 103:62.) It further found that Juror Hilscher "wasn't nearly as emotional as some of the previous jurors that we talked to in here," including one juror who was "basically crying." (R. 103:62.) And it recognized that Juror Hilscher agreed that "she is going to do her best," which the court considered "what probably 99 percent of people would say from the community when they come onto the jury." (R. 103:62–63.)

Defense counsel did not later exercise a peremptory strike to remove Juror Hilscher. (*See* R. 61:1.)

The jury found Mathewson guilty of repeated sexual assault of a child. (R. 63; 104:137–38.) The court entered a judgment of conviction based on that verdict and later sentenced Mathewson to 15 years' initial confinement and 10 years' extended supervision. (R. 78:1; 102:18; 104:138–39.)

Mathewson appeals. (R. 113:1.)

STANDARD OF REVIEW

Mathewson argues that Juror Hilscher was subjectively biased. (Mathewson's Br. 12.) An appellate court will "uphold the circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous." *State v. Gutierrez*, 2020 WI 52, ¶ 18, 391 Wis. 2d 799, 943 N.W.2d 870 (quoting *State v. Lepsch*, 2017 WI 27, ¶ 23, 374 Wis. 2d 98, 892 N.W.2d 682).

ARGUMENT

Mathewson is not entitled to a new trial because he failed to prove that Juror Hilscher was subjectively biased.

A. Juror Hilscher was presumed impartial unless Mathewson proved otherwise.

"The United States and Wisconsin Constitutions guarantee a criminal defendant the right to a trial by an impartial jury." *State v. (Theodore) Oswald*, 2000 WI App 2, ¶ 16, 232 Wis. 2d 62, 606 N.W.2d 207.

This Court presumes the impartiality of the jurors who served at Mathewson's trial—including Juror Hilscher—and Mathewson "bears the burden of rebutting th[at] presumption and proving bias." *See State v. Funk*, 2011 WI 62, ¶ 31, 335 Wis. 2d 369, 799 N.W.2d 421 (quoting *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990)).

Juror bias claims come in three varieties. *Lepsch*, 374 Wis. 2d 98, ¶ 22. The first—statutory bias—concerns jurors

who are "related by blood, marriage or adoption to any party or to any attorney appearing in the case, or ha[ve] any financial interest in the case." *State v. Smith*, 2006 WI 74, ¶ 19, 291 Wis. 2d 569, 716 N.W.2d 482 (quoting Wis. Stat. § 805.08(1)). The second—objective bias—focuses "not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial." *State v. Faucher*, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999).

Finally comes subjective juror bias—the only claim Mathewson advances on appeal—which considers "the words and the demeanor of the prospective juror" to assess her "state of mind." *Id*. at 717. "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 juror might have." *(Theodore) Oswald*, 232 Wis. 2d 62, ¶ 19. "While there may be the occasion when a prospective juror explicitly admits to a prejudice, or explicitly admits to an inability to set aside a prejudice, most frequently the prospective juror's subjective bias will only be revealed through his or her demeanor." *Faucher*, 227 Wis. 2d at 718.

Given the need to personally assess the juror on matters not readily apparent from a transcript, this Court "employ[s] the clearly erroneous standard because the trial court is in the unique position to assess the prospective juror's demeanor and tone," and it "will not second-guess these observations when all [it] sees is a cold record." *State v. (James) Oswald*, 2000 WI App 3, ¶ 5, 232 Wis. 2d 103, 606 N.W.2d 238. "[W]hen reviewing a circuit court's decision on subjective bias, [this Court does] not focus on particular, isolated words the juror used. Rather, [it] look[s] at the record as a whole, using a very deferential lens, to determine if it supports the circuit court's conclusion." *Id*. ¶ 6.

B. The circuit court found that Juror Hilscher was not biased, and Mathewson has not carried the heavy burden of proving that finding was clearly erroneous.

The circuit court was required to excuse Juror Hilscher for cause only if it found that she was "not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have." *See (Theodore) Oswald*, 232 Wis. 2d 62, ¶ 19. With a front row seat to observe Juror Hilscher's demeanor and listen to her various answers, the circuit court made no such finding.

Instead, the court found Juror Hilscher's answers revealed that she was willing to do what "probably 99 percent" of jurors would say: "that they are going do their best to evaluate the evidence and make a decision." (R. 103:62–63.) It further recognized that Juror Hilscher "underst[ood] the obligation of serving as a juror and that she's required to follow the judge's instructions." (R. 103:62.) It also took note of Juror Hilscher's demeanor, recognizing that she was not "nearly as emotional" as some prospective jurors who were excused, including one who was "basically crying." (R. 103:62.)

Because those findings were aptly supported by the record and not clearly erroneous, this Court must defer to them. *(James) Oswald*, 232 Wis. 2d 103, ¶ 5. As is often the case, the circuit court was in a prime position to assess the various jurors' demeanors and responses, and it decided that some individuals should be excused because he or she explicitly professed an inability to remain fair and unbiased, described past life experiences that would ultimately inhibit an objective view of the evidence, or exhibited signs of a physical incapacity to listen to the evidence without breaking down emotionally. (R. 103:25–45.)

Juror Hilscher was different. Though she expressed some initial concerns about listening to the evidence and instructions provided, Juror Hilscher ultimately confirmed

several times that she would "try" and "do [her] best" to do so if selected for Mathewson's jury. (R. 103:58–60.) She also confirmed that she understood the presumption of innocence, that the State maintained the burden of proof to prove each element of the charged crime beyond a reasonable doubt, that the court needed members of the community to decide the case based on the facts, and that her questioning was intended to ensure that she could "be fair, impartial, and unbiased." (R. 103:57.) And as she answered numerous questions, Juror Hilscher was composed and nowhere near as emotional as potential jurors who needed to be excused from Mathewson's trial. (R. 103:62.)

Although Mathewson might have preferred that Juror Hilscher offer more decisive answers when asked about her ability to set aside her feelings about child sexual assault and decide his case based on the evidence and instructions provided, her inability to do so did not deprive him of a fair and impartial jury. Reviewing countless subjective juror bias claims through a "deferential lens," this Court has reliably concluded that a juror is not subjectively biased just because she is unable to muster an unequivocal assertion that she can set aside particular biases. *(James) Oswald*, 232 Wis. 2d 103, ¶ 5. It should do the same here, for it has previously upheld the refusal to excuse jurors who offered more concerning or ambiguous responses than Juror Hilscher.

For example, in *(James) Oswald*, this Court upheld the circuit court's refusal to strike for cause a woman who explicitly questioned her own objectivity, professed her belief that the charged robbery occurred, and when asked pointedly whether she could set aside previously obtained information to decide the case based solely only the evidence and instructions provided at trial, mustered an equivocal, "Probably, yeah." *Id.* ¶ 15. In the same case, this Court also upheld the circuit court's refusal to strike for cause a woman who both conceded that she saw a recording of the shooting—

which she believed proved one of the defendants' guilt—and asserted not that she would set aside that information in reaching a verdict but that she knew, as a juror, she would be required to do so. *Id.* ¶ 16. And having uttered nearly identical responses as Juror Hilscher, this Court upheld the circuit court's refusal to excuse a man who advised the court that he "would try to do [his] best" to decide the case based solely on evidence presented in court. *Id.* ¶ 19.

Despite each of those respective jurors' reservations, this Court reaffirmed that "a prospective juror need not give 'unequivocal assurances' of his or her ability to set aside any prior knowledge or opinion about the case," that the circuit court was "in a much better position" than the appellate court "to determine if a response of 'probably' or 'I'll try' is sincere," and that the record supported the circuit court's decision not to remove any of the three jurors for subjective bias. *Id.* ¶ 19.

Bearing the same sort of similarities to Juror Hilscher's responses, in *State v. Conger*, No. 2017AP860-CR, 2017 WL 4708098, ¶ 15 (Wis. Ct. App. Oct. 18, 2017) (unpublished),[1] this Court upheld the circuit court's refusal to strike for cause a juror who *initially* claimed that she could set aside her prejudices and decide the case based solely on the evidence and instructions provided, only to later hedge that answer, averring that she would "do [her] best" to do so without considering evidence presented at another trial. In so deciding, this Court again reaffirmed that jurors "need not respond to voir dire questions with unequivocal declarations of impartiality." *Id.* ¶ 19 (quoting *(James) Oswald*, 232 Wis. 2d 103, ¶ 6).

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[1] The unpublished decision cited by the State is offered for its persuasive value as permitted by Wis. Stat. § (Rule) 809.23(3)(b). A copy of the decision is included in the State's supplemental appendix. *See* Wis. Stat. § (Rule) 809.23(3)(c).

Then, in *Gutierrez*, our supreme court rejected a defendant's argument that he was denied an impartial jury because one of the jurors answered defense counsel's question about "whether any prospective juror felt they could not be fair and impartial given the nature of the charges" with, "I don't know if I could be impartial. I work with kids. I drive school bus, so I deal with kids all of the time, and I just, I don't know if I can be impartial." *Gutierrez*, 391 Wis. 2d 799, ¶¶ 11, 38–42. Again, the court reaffirmed that jurors are permitted to equivocate, and when they do so,

> [a] circuit court "is in a far superior position to ascertain bias than is an appellate court whose only link to the voir dire is through the 'bare words on a transcript,'" and may properly determine a prospective juror can be impartial despite a less than unequivocal affirmation of impartiality.

Id. ¶ 41 (citation omitted).

Applying these principles to the case at bar, this Court should conclude that the circuit court did not err by declining to remove Juror Hilscher for cause due to alleged subjective bias. While she admittedly struggled with the nature of Mathewson's prosecution—a child sexual assault—she expressed an understanding of the need for any juror selected to serve on Mathewson's jury to be "fair, impartial, and unbiased," and the circuit court found that she understood the same. (R. 103:57, 62.)

At no time did Juror Hilscher ever state that she would not listen to the evidence and decide the case based on the evidence and instructions provided. (*See* R. 103:56–60.) Rather, just like the juror in *Gutierrez*, she self-reflected and scrutinized her ability to serve as an impartial juror, and like the juror in *Conger* and one of the jurors in *(James) Oswald*, she insisted that she would "do her best." She was required to do no more to serve on Mathewson's jury.

Mathewson disagrees, but his argument is both undercut by his strained interpretation of governing case law and defeated by the applicable standard of review.

To begin, Mathewson concedes that "a prospective juror need not give an 'unequivocal assurance' of impartiality." (Mathewson's Br. 15.) However, he pays mere lip service to the principle, effectively asking this Court to ignore binding case law in favor of non-binding Seventh Circuit authority. (Mathewson's Br. 15–16.) But it is of no consequence whether the Seventh Circuit is confident in a juror's impartiality if she is unable to definitively "state that she will serve fairly and impartially," (Mathewson's Br. 16 (quoting *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001)).) This Court made it abundantly clear that decisive responses, while perhaps preferred by some, are not necessary to ensure a juror's impartiality. *(James) Oswald*, 232 Wis. 2d 103, ¶ 19.

Additionally, Juror Hilscher did more than simply say she could "probably" do something like in *State v. Ferron*, 219 Wis. 2d 481, 501, 579 N.W.2d 654 (1998), *abrogated on other grounds by State v. Lindell*, 2001 WI 108, ¶ 40, 245 Wis. 2d 689, 629 N.W.2d 223. She repeated that she would do "try" and "do [her] best" to listen to the evidence and apply the instructions as directed if selected for the jury, and she convinced the circuit court that she understood the duty to do so. (R. 103:58–62.) If that was enough for this Court to affirm where a juror made the same assertion in *(James) Oswald*, the same result should follow here.

To that end, in attempts to distinguish *(James) Oswald*, Mathewson now cites to the appendix filed in that appeal to introduce facts which this Court did not reference in its opinion and which did not seem to play any role in this Court's analysis. (Mathewson's Br. 15 n.1.) Specifically, he contends that the juror in *(James) Oswald* who insisted he "would try to do [his] best" made additional statements that assured his impartiality. (Mathewson's Br. 15.) But it should go without

saying that this Court's analysis did not turn on facts that it failed to reference. This Court merely acknowledged that juror "Paul A." claimed that he would "try to do [his] best" to not be influenced by publicity and to decide the case based on the evidence presented, and it affirmed the circuit court's decision not to remove "Paul A." from the jury because the lower court was "in a much better position . . . to determine if a response of . . . 'I'll try' is sincere." *(James) Oswald*, 232 Wis. 2d 103, ¶ 19.

Just as in that case, the circuit court was in the best place to decide whether Juror Hilscher was biased, and it concluded she was not, which brings us to the final problem with Mathewson's argument: it wholly ignores the applicable standard of review. Indeed, this Court is not tasked with deciding whether it, too, would have declined to remove Juror Hilscher from the jury that served at Mathewson's trial. No, this Court is merely charged with deciding whether the circuit court's finding that Juror Hilscher was not subjectively biased was "clearly erroneous." *Gutierrez*, 391 Wis. 2d 799, ¶ 18.

"A circuit court's finding of fact is not clearly erroneous unless it is against the great weight and clear preponderance of the evidence." *State v. Wiskerchen*, 2019 WI 1, ¶ 17, 385 Wis. 2d 120, 921 N.W.2d 730. "[E]ven though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." *Reusch v. Roob*, 2000 WI App 76, ¶ 8, 234 Wis. 2d 270, 610 N.W.2d 168. Or, described more colorfully, a finding will not be declared clearly erroneous unless it is "wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Disciplinary Proceedings Against Boyle*, 2015 WI 110, ¶ 41, 365 Wis. 2d 649, 872 N.W.2d 637 (quoting *United States v. Di Mucci*, 879 F.2d 1488, 1494 (7th Cir. 1989)).

Based on Juror Hilscher's transparent answers and her perceived nonverbal demeanor, which was not nearly as

extreme as some other jurors who were excused for cause, this Court cannot hold that the circuit court's findings were so wrong so as to label them clearly erroneous. As the circuit court eloquently explained, Juror Hilscher's assertion that she would "do her best" was what an overwhelming majority of jurors would aspire to do in evaluating evidence and rendering a decision. (R. 103:62–63.) And given that this Court has deemed similar assertions sufficient to establish a lack of subjective juror bias in *(James) Oswald* and *Conger*, the circuit court was in good company when it found that Juror Hilscher's answers and demeanor did not reveal a subjective bias warranting removal.

In the end, Mathewson was convicted by an impartial jury, and he has not established that any of the 12 members of that jury were subjectively biased. He is not entitled to a new trial, and this Court should therefore affirm.

CONCLUSION

This Court should affirm Mathewson's judgment of conviction.

Dated this 11th day of May 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,865 words.

Dated this 11th day of May 2023.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of May 2023.

Electronically signed by:

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