

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1389-CR

Cir. Ct. No. 2004CF2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN JOHN THOMSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Florence County: ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kevin Thomson appeals a judgment, entered upon a jury's verdict, convicting him of two counts of burglary. He also appeals an order denying his motion for postconviction relief. Thomson argues a new trial is warranted because a newspaper article published the day before trial, as well as a

comment by the State's key witness, impermissibly put the fact of Thomson's prior convictions before the jury. We reject his arguments and affirm.

Background

¶2 Just before 3 a.m. on January 1, 2004, Niagara police officers Carl Lamoreaux and Robert Hulce were dispatched to investigate a burglary alarm at an insurance agency. When they arrived at the scene, Lamoreaux observed a vehicle turn off of a side street at a relatively high rate of speed. He activated the squad car's lights and then stopped the vehicle, which appeared to be occupied by two males. Within seconds of the stop, the vehicle took off and the officers pursued.

¶3 After a fifteen-minute chase, the car, registered to Thomson, went into a ditch. Both occupants fled on foot, with the passenger carrying a dark duffel bag. Hulce pursued and apprehended the passenger, later identified as Thomson. The driver, Terry Barr, eluded Lamoreaux but was arrested approximately thirty minutes later. A Marinette County sheriff's deputy retraced Hulce's path of pursuit and recovered a gray lock box and some coins—both of which had been reported missing from a home in the area that night—as well as a duffel bag containing a screwdriver, flashlight, and gloves. Based on the evidence recovered, and reports of other burglaries that evening, Thomson was charged with two counts of burglary and one count of attempted burglary, all as a repeater.

¶4 Much of the State's case hinged on Barr's testimony. Barr recited a timeline of events for the jury. He stated they met at a bar around 8 p.m. on New Year's Eve, then drank until midnight or 1 a.m. before driving around looking for "places to break into." Thomson's defense was to use testimony from his sister and mother to challenge Barr's credibility. Both women testified Thomson was at

his mother's house until somewhere between 9 and 10 p.m., when he left to find Barr, who had borrowed but not yet returned Thomson's vehicle.

¶5 The jury convicted Thomson on the two burglary charges,¹ and he was sentenced to concurrent ten-year terms, consisting of five years' initial confinement and five years' extended supervision, consecutive to any sentence he was then serving. Thomson filed a postconviction motion seeking a new trial, which the court denied.

Discussion

I. The Newspaper Article and Juror Bias

¶6 The morning of trial, Thomson sought a change of venue. The previous evening, a regional newspaper had run a small story on the front page about Thomson's upcoming trial. The article read:

Jury selection is scheduled to begin Wednesday [in] Florence County Circuit Court in a trial for a 23-year-old Niagara, Wis., resident charged with three counts of burglary, three counts of criminal damage to property and being a habitual offender.

Kevin Thomson, 23, Niagara, is charged in connection to burglaries committed on Jan. 1, at the Stephenson Marketing Co-Op in the Town of Aurora, Wis., Demolition Disposal of Aurora, Wis., and the breaking and entering of a private residence on Fischer Lake Parkway in Florence.

Thomson, and his alleged accomplice Terry Barr, 27, Pembine, Wis., were arrested by law enforcement officials on Jan. 1 following a high speed chase.

Both Thomson and Barr are currently lodged in the Florence County Jail.

¹ The attempted burglary charge was dismissed after the completion of trial testimony.

¶7 Defense counsel pointed out that the article was inaccurate—Thomson had not been charged with criminal damage to property—and asserted it prejudicially identified the “habitual offender” enhancer. The court denied the request for a change of venue, and Thomson concedes it was acceptable for the court to proceed with voir dire at that time.

¶8 Voir dire revealed that a significant number of the jurors² had read the article the night before. The court permitted further questioning of the jurors, but ultimately declined to strike for cause all jurors who had read the article. The court relied on jurors’ reassurances that they could remain impartial if empanelled. Following jury selection, Thomson renewed his request for a change of venue because he lacked a sufficient number of peremptory challenges to remove all the jurors who had read the article. The court again denied the motion. Thomson asserts the court should have dismissed all jurors who had read the article for cause because of prejudicial bias.³

¶9 A criminal defendant’s right to a fair trial by impartial jurors is guaranteed by both the United States and Wisconsin Constitutions, as well as by principles of due process. *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). Whether to dismiss a juror for cause rests with the discretion of the trial court. *State v. Zurfluh*, 134 Wis. 2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986). Prospective jurors are presumed impartial; the challenger bears the burden of proving bias. *State v. Smith*, 2006 WI 74, ¶19, 291 Wis. 2d 569, 716 N.W.2d

² The actual issue in this case deals with what prospective jurors knew. However, we use “juror” and “prospective juror” interchangeably throughout this opinion.

³ Thomson does not directly appeal the denials of the motions to change venue.

482. There are three recognized types of bias: statutory, subjective, and objective. *Faucher*, 227 Wis. 2d at 716.

¶10 The parties agree this case involves only a question of objective bias. “[W]hether a juror is objectively biased is a mixed question of fact and law.” *Smith*, 291 Wis. 2d 569, ¶22. The circuit court’s findings regarding the facts and circumstances of voir dire and the case are upheld unless clearly erroneous. *Id.* Whether the facts fulfill the legal standard of bias presents a question of law. *Id.* Although we do not ordinarily defer to a circuit court’s determination on a question of law, a conclusion on objective bias is so intertwined with the factual findings that it is appropriate for us to give weight to the circuit court’s conclusion. *Id.* But if the court makes an error of law, this amounts to an erroneous exercise of discretion. See *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶71, 281 Wis. 2d 173, 696 N.W.2d 194; *Zurfluh*, 134 Wis. 2d at 439.

¶11 Objective bias normally requires either a “direct or personal connection between the challenged juror and some important aspect” of the case or “a firmly held negative predisposition by the juror regarding the justice system that precludes the juror from fairly and impartially deciding the case.” *State v. Jimmie R.R.*, 2000 WI App 5, ¶19, 232 Wis. 2d 138, 606 N.W.2d 196. When we analyze whether a juror is objectively biased,

the focus of the inquiry ... is 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. When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. However, the emphasis of this assessment remains on the reasonable person in light of those facts and circumstances.

Faucher, 227 Wis. 2d at 718-19.

¶12 Thomson asserts that jurors who read the article had a “direct or personal connection” with an important aspect of the case. He contends that once he “demonstrated that prospective jurors had read the news article in the previous evening newspaper, a prima facie showing had been made that those jurors who had read the article were tainted by ‘objective bias’ and needed to be excused for cause.”⁴ However, “the law has long recognized that it is impossible to empanel a jury completely immune from prejudice and totally insulated from non-evidentiary information.” *State v. Messelt*, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994).

¶13 Thus, revealing the defendant’s habitual offender status to the jury does not automatically mandate a new trial. In *Messelt*, the defendant was charged with the assault of an elderly woman. A series of articles on him ran in local papers, revealing he had twice been convicted of sexual assault. One of the jurors admitted he knew of the defendant’s criminal record based on the article. The trial court held, and the supreme court affirmed, that juror bias could not be

⁴ Thomson appears to be asking for a per se exclusion that any time jurors read extraneous information in a newspaper article, they should be excluded. He denies that he is asking for such an exclusion, but repeatedly asserts that disclosure of his habitual offender status creates objective bias and all the jurors knowing it should therefore be excluded. We note simply that courts are generally loathe to make per se exclusions of classes of jurors. See *State v. Smith*, 2006 WI 74, ¶31, 291 Wis. 2d 569, 716 N.W.2d 482.

implied⁵ from the pretrial information and the trial court therefore did not erroneously exercise its discretion by allowing the juror to remain on the panel.⁶

¶14 Assuming, however, that reading the article created a direct or personal connection between jurors and Thomson’s case, the test is whether a reasonable person in each juror’s position could set aside the prior knowledge. We conclude the trial court properly determined it was unnecessary to dismiss the jurors for cause.

¶15 Jurors who had read the article affirmed that they could, in fact, be impartial. Despite an inherent subjectiveness to jurors’ assurances, the subjective state of mind of the juror is an important consideration in the overall objective bias determination. *Smith*, 291 Wis. 2d 569, ¶25; *Jimmie R.R.*, 232 Wis. 2d 138, ¶¶20-23. The court had the opportunity to evaluate the jurors’ demeanor and reassurances during voir dire, determining the jurors were sincere. The court also invited further questioning of jurors by counsel.⁷ Ultimately, the fact that jurors

⁵ *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), re-examined and clarified juror bias law, designating the types of bias as statutory, subjective, and objective, thus replacing terms already in use. Although the new terms did not neatly or exactly replace previous terminology, the court noted that objective bias “in some ways contemplates both our use of the terms implied and inferred bias.” *Id.* at 716.

⁶ Thomson also directs us to *State v. Broomfield*, 223 Wis. 2d 465, 480, 589 N.W.2d 225 (1999), to suggest newspaper articles carry an inherent authoritative weight that might prevent the jury from being impartial. In *Broomfield*, one juror overheard information from two other jurors regarding a previously hung jury involving earlier charges against Broomfield. The supreme court ultimately declined to give Broomfield a new trial, concluding, “Overhearing comments between two displeased panel members is quite unlike a potential juror reading information in the newspaper or hearing it on the news. The information has little indication of trustworthiness.” *Id.* Contrary to Thomson’s reading of the case, however, *Broomfield* does not hold that information read in newspapers results in juror bias.

⁷ Thomson insists that voir dire should have been more extensive, both for purposes of determining objective bias and as an attempt to rehabilitate the jurors. However, this remedy is better geared to a subjective bias problem. See *Faucher*, 227 Wis. 2d at 718.

merely read the article did not make it “utterly impossible” for them to be impartial. See *Smith*, 291 Wis. 2d 569, ¶40.

¶16 The court also properly denied the motion for a new trial. Although the court concluded the jurors would be able to set aside their pre-existing knowledge, it also instructed the jurors that anything they saw or read outside the court was not evidence. We presume jurors follow the court’s instructions. *State v. Adams*, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).⁸

II. Barr’s Testimony

¶17 Thomson also argues the court erred in denying his motion for a mistrial. As mentioned, a large portion of the State’s case against Thomson came from alleged accomplice Terry Barr’s testimony. During direct examination, when the State asked him how he knew Thomson, Barr stated, “We did some time together in Portage[.]” Thomson moved immediately for a mistrial. The court took the motion under advisement, later denying it and stating:

⁸ It is true that we generally preclude other acts evidence from being admitted at trial. The habitual offender is, after all, entitled to the same fair trial as the first-time offender. *Mulkovich v. State*, 73 Wis. 2d 464, 472, 243 N.W.2d 198 (1976). Thus, in *Wells v. State*, 40 Wis. 2d 724, 162 N.W.2d 634 (1968), for example, there was error when extraneous information about the defendant’s prior conviction reached the jury after the assistant district attorney read the entire Information, including the repeater allegation, to them, although that error was ultimately deemed waived. *Id.* at 732 n.4. And where the court read the repeater charged to the jury, reversible error was committed. *Mulkovich*, 73 Wis. 2d at 473.

However, those errors occurred after the juries were empanelled. At that point, the question is not whether jurors can set aside prior knowledge and be impartial but, rather, whether “there is a reasonable possibility that the information in [the juror’s] possession would have a prejudicial effect upon a hypothetical average juror.” *Faucher*, 227 Wis. 2d at 718-19 (citation omitted). In any event, a new trial is not automatic any time jurors discover information about a defendant’s prior convictions. A most notable exception, for instance, is that we permit the number of prior convictions to be put before the jury as impeachment evidence. See WIS. STAT. § 906.09 (2005-06).

I think he said “spent time together in Portage,” is what I wrote down. I’m not sure what the record actually reflected, but I think, as I recall, he said “spent time together in Portage.” I wrote this in my notes. Whether that’s the words or not, I’m not sure.

¶18 The decision to grant a mistrial is committed to the trial court’s discretion and is based on whether, in light of the entire proceeding, “the claimed error was sufficiently prejudicial to warrant a new trial.” *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. A proper exercise of discretion utilizes “facts that are of record” to reach “a conclusion based on a logical rationale founded upon proper legal standards.” *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1970); *State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197. Thomson asserts the trial court erroneously exercised its discretion when it denied the mistrial based on a misrepresentation of Barr’s testimony. The State responds that it is not clear the jurors would have known what Barr’s statement meant.

¶19 We may affirm a trial court if it “reached the right result, but for the wrong reason.” *Doe v. GMAC*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7; *State v. Alles*, 106 Wis. 2d 368, 392, 316 N.W.2d 378 (1982). We conclude that, assuming the jurors understood Barr’s statement—which, contrary to the State’s position, is a more than reasonable assumption—it is not so prejudicial as to warrant a new trial in light of proceedings as a whole.

¶20 First, Barr’s statement is of limited importance. The trial court cautioned jurors to consider his testimony with “caution and great care.” Indeed, much of Thomson’s argument on appeal focuses on characterizing Barr’s testimony as incredible. Second, Barr’s brief statement is not significantly more prejudicial than the fact that Thomson had any association with Barr at all. Barr

had at least seven prior convictions, admittedly lied to police during their investigation, and confessed he was both “drunk and high” during the burglary spree.

¶21 Most compelling, however, is the substantial evidence of Thomson’s guilt.⁹ Thomson’s sister testified she had given him a duffel bag and had seen it in his vehicle. This is the same duffel bag that was later recovered when a deputy retraced Thomson’s flight path, as Thomson’s mother identified the bag as one previously belonging to her daughter. The duffel bag contained a flashlight, a screwdriver, and gloves—burglary tools. Found near the duffel were a gray lock box and coins reported missing from one of the victimized locations. Thomson further could not explain why he fled from police once Barr finally stopped the vehicle. Indeed, flight from the police is “undeniably suspicious behavior” and a “strong indication of ... a guilty mind or a guilty purpose....” *State v. Anderson*, 155 Wis. 2d 77, 79, 84, 454 N.W.2d 763 (1990). Barr’s statement about doing “some time together in Portage” was not so prejudicial in the context of the entire trial as to warrant mistrial.

¶22 We also reject Thomson’s claim of cumulative error and his request for discretionary reversal. Because there was no error in failing to grant the

⁹ For this reason, we would also hold that even if there were error in not dismissing the jurors for cause, any error would have been harmless. Even constitutional errors are subject to the harmless error test. “A constitutional error is harmless beyond a reasonable doubt if there is no reasonable possibility that the error might have contributed to the conviction.” *State v. Fencil*, 109 Wis. 2d 224, 238, 325 N.W.2d 703 (1982). “We have considered the following factors in determining whether a constitutional error was harmless beyond a reasonable doubt: (1) the frequency of the error; (2) the nature of the state’s evidence against the defendant; and (3) the nature of the defense.” *Id.* Thomson’s defense focused on challenging Barr’s credibility, and the State’s physical evidence was overwhelming even if the jury considered Barr’s testimony completely unbelievable.

mistrial or dismiss jurors for cause, there can be no cumulative error. *See Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Further, our discretionary reversal power is formidable, to be exercised sparingly and with great caution. *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. This is simply not one of those “most exceptional cases” requiring discretionary reversal. *See State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

By the Court.—Judgment and order affirmed.

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

