

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0305**

State of Minnesota,
Respondent,

vs.

Daryl Craig Kivi,
Appellant.

**Filed March 18, 2024
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-21-13773

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Larkin,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury found Darryl Craig Kivi¹ guilty of three counts of criminal sexual conduct based on evidence that he sexually abused three of his minor step-granddaughters between 2007 and 2012. We conclude that the district court did not err by denying Kivi's motion to strike a juror for bias. We also conclude that the district court did not err by denying Kivi's mid-trial motion for a mistrial. Therefore, we affirm.

FACTS

Kivi was married to D.R. for 30 years, from 1985 to 2015. D.R. has three granddaughters who are children of D.R.'s children from a prior marriage: J.T., R.H.-S., and J.L. The three granddaughters visited the home of D.R. and Kivi in the city of Greenfield on multiple occasions.

In February 2020, 20-year-old J.T. reported to a police officer that she had been sexually abused by Kivi when she was between 10 and 12 years old. In May 2021, 19-year-old R.H.-S. reported to a police officer that she also had been sexually abused by Kivi when she was between five and six years old. Soon thereafter, 14-year-old J.L. reported that she too had been sexually abused by Kivi when she was between three and six years old.

¹Our case caption indicates that appellant's first name is Daryl, which conforms to the district court's sentencing order and the notice of appeal. *See* Minn. R. Civ. App. P. 143.01. At trial, however, Kivi testified that his first name is spelled Darryl. Thus, we use that spelling for purposes of this opinion.

In July 2021, the state charged Kivi with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), based on J.T.’s accusations, and two counts of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2006 & 2008), based on the accusations of R.H.-S. and J.L.

The matter was tried to a jury on six days in October 2022. The state called 12 witnesses in its case-in-chief: J.T., R.H.-S., J.L., their mothers, D.R., J.T.’s former boyfriend, J.L.’s former therapist, and three police officers. Kivi testified in his own defense. The jury found Kivi guilty on all three counts. The district court imposed concurrent prison sentences of 216, 36, and 48 months. Kivi appeals.

DECISION

I. Motion to Strike Juror

Kivi first argues that the district court erred by denying his motion to strike Juror 17 for cause.

A defendant in a criminal case has a constitutional right to an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. “Because the impartiality of the adjudicator goes to the very integrity of the legal system, . . . the bias of a single juror violates the defendant’s right to a fair trial.” *State v. Evans*, 756 N.W.2d 854, 863 (Minn. 2008) (quotations omitted). The presence of a biased factfinder is a structural error, which requires automatic reversal. *Id.*

In a criminal case, a party may challenge a prospective juror for cause on any of 11 grounds, including the ground that “[t]he juror’s state of mind—in reference to the case or

to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party.” Minn. R. Crim. P. 26.02, subd. 5(1), 5(1)1. A district court may remove a juror if the juror “expresse[s] a ‘state of mind’ demonstrating ‘actual bias’ towards the case or either party.” *State v. Munt*, 831 N.W.2d 569, 577 (Minn. 2013) (quoting *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007)).

On appeal, an appellate court asks two questions. “First, we must determine whether the juror expressed actual bias by reviewing the juror’s voir dire answers in context.” *State v. Ulrich*, No. A22-1340, ____ N.W.3d ____, ____, 2024 WL 696752, at *4 (Minn. Feb. 21, 2024). A juror expresses actual bias if “the juror exhibit[s] strong and deep impressions that would prevent her from laying aside her impression or opinion and rendering a verdict based on the evidence presented in court.” *Munt*, 831 N.W.2d at 577 (quotations and alterations omitted). Second, if a juror has expressed actual bias, we must determine “whether the juror was properly rehabilitated.” *Ulrich*, No. A22-1340, ____ N.W.3d at ____, 2024 WL 696752, at *4. A juror is rehabilitated “if he or she states unequivocally that he or she will follow the district court’s instructions and will set aside any preconceived notions and fairly evaluate the evidence.” *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotation omitted).

Appellate courts apply an abuse-of-discretion standard of review to a district court’s denial of a for-cause challenge. *Id.* Appellate review of a district court’s determination of juror impartiality is “especially deferential,” *Munt*, 831 N.W.2d at 576, because “a district court is best positioned to judge a juror’s demeanor, as opposed to an appellate court’s

review of a cold record,” *Ulrich*, No. A22-1340, ____ N.W.3d at ____, 2024 WL 696752, at *4.

In this case, the district court assembled a venire panel of 30 persons. The district court began *voir dire* by questioning all prospective jurors as a group. The district court and counsel later questioned several prospective jurors individually, outside the presence of other prospective jurors. Juror 17 was among the prospective jurors who were questioned individually.

Juror 17 had disclosed in a written answer to a jury questionnaire that her mother had been raped. In response to questions asked by Kivi’s trial attorney, Juror 17 revealed that, in the late 1950s, her grandfather had raped her mother over the course of three years, beginning when her mother was 13 years old. Juror 17 said it was “devastating” and that she was “shocked” upon discovering this information in her early 20s. Juror 17 indicated that she was unsure of the effect that the facts of this case would have on her.

Juror 17 also made statements indicating that she would render a verdict based on the evidence. For example, she stated, “I feel like everybody is entitled to due process, and you do have to know facts. Those are right now accusations.” When asked whether her initial reaction to the charges would affect her perception of the case, she said, “I would have to hear the facts to—to be biased—to not have a bias in it, basically. . . . I’d like to think of myself to give anybody the benefit of the doubt first and hear facts first.” When asked whether she would have difficulty controlling her emotions, she said, “Oh, no. I can control my emotions because . . . at work, I tell people it’s strictly business. It’s not

personal. . . . But it is facts. You have to stick to the facts.” When asked additional questions about the impact that the evidence might have on her, she stated,

I don’t know what the accusations are; right? We haven’t heard anything. I don’t know this person. I don’t know the case. I don’t know the four, three or four—is it the same child? Is it different children? I don’t know, right?

. . . .

Regardless that I would have a reaction, my judgment would come, again, based off of fact. I’m a very factual person. I deal in facts every day, and facts beat opinions 5,000 percent.

After Juror 17 left the courtroom, Kivi’s attorney moved to strike her for cause. In response, the prosecutor opposed the motion for the following reasons:

Judge, I do not believe [Juror 17] is an appropriate for-cause strike. She seems very confident and definitive that these are charges. Everybody’s entitled to due process. People accuse people of a lot of things, and she would have to hear all the facts and gives anyone the benefit of the doubt. She seemed very adamant in her ability to set aside her emotions and very candid in the reality of she doesn’t know how she’s going to react when she hears the testimony but that she wants to hear all of the facts regardless of any emotion that may come from any testimony or evidence presented and that—again, quoting [Juror 17]—that she would give anyone the benefit of the doubt. So I think that she can be fair and unbiased in this case and would ask that she remain.

The district court stated, “I agree with that summation, and I’m going to deny the motion for cause.”

On appeal, Kivi contends that, although Juror 17’s statements are not “express statements of bias,” they are “probative of bias.” Kivi emphasizes Juror 17’s “candid and repeated acknowledgment of the effect that her mother’s experience had on her and that

she did not know how she might react to hearing the evidence.” Juror 17 did express uncertainty about how she would react emotionally to the evidence. But she was clear in making a distinction between her emotional reactions and her evaluation of the evidence, thereby demonstrating that she would “render[] a verdict based on the evidence presented in court.” *See Munt*, 831 N.W.2d at 577 (quotation omitted).

Kivi also contends that Juror 17 demonstrated bias by stating that she would need to hear the facts of the case to determine *whether* she would be biased. He points to Juror 17’s statement that she “would have to hear the facts to—to be biased—to not have a bias in it, basically.” That statement is somewhat unclear, but we do not believe it reflects actual bias. As the United States Supreme Court has explained, it is “not unusual on *voir dire* examination” for prospective jurors to make ambiguous or contradictory statements. *Patton v. Yount*, 467 U.S. 1025, 1039 (1984).

[U]nlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id. Shortly after the statement identified by Kivi, Juror 17 stated that she would like to “give anybody the benefit of the doubt first and hear facts first.” When read in context with Juror 17’s other statements, the statement identified by Kivi does not indicate actual bias.

Thus, Juror 17 did not express actual bias. Accordingly, the district court did not err by denying Kivi's motion to strike Juror 17 for cause.

II. Motion for Mistrial

Kivi also argues that the district court erred by denying his mid-trial motion for a mistrial.

Kivi moved for a mistrial after the state had rested its case. The motion was based on a claim that the state possibly had exposed jurors to inadmissible evidence by not properly redacting a transcript of an audio-recording. During trial, the state played for the jury an audio-recording of a statement that J.T. had given to police in February 2020. The state provided a transcript to the district court and to each juror as a listening aid. While the recording was played, the district court noticed that the transcript included a reference by J.T. to the existence of child pornography on Kivi's computer. The district court previously had ruled that such evidence would not be admitted. The district court saw that reference before the jurors heard it, stopped the recording and asked counsel to approach for a bench conference, which was not reported. The district court then collected the transcripts and gave the jury the following instruction:

Members of the jury, to the extent that any of you was a fast reader and read forward in the transcript that you have in your presence, you are not to do that. And we failed to tell you that in advance. But, to the extent that you read anything after you heard a recording, you're to disregard it, and you're to strike it from your memory altogether, and you may not rely upon it in arriving at your decision in this case.

At the conclusion of the state's case-in-chief, Kivi moved for a mistrial on the ground that "there was mention of child pornography." The prosecutor responded by

apologizing for not redacting the reference and by stating, “We did not get to that point in the statement, thanks to Your Honor. The jury did not hear it.” The prosecutor further stated that the audio-recording was stopped at the top of page eight of the transcript and that the reference to child pornography was at the bottom of that page. Both the prosecutor and Kivi’s attorney stated that it was unknown whether any juror read the reference to child pornography at the bottom of page eight.

In ruling on the motion, the district court stated that it had been “reading ahead . . . by one full page” when it noticed the reference to child pornography and interrupted the playing of the audio-recording. The district court stated that it did not know whether any jurors were reading ahead but that “juries are told to follow the law and the instructions of the Court, and it’s been my experience that they do that.” For those reasons, the district court denied the motion for a mistrial.

Kivi contends that this court should review the district court’s ruling by applying the four-factor test set forth in *State v. Cox*, 322 N.W.2d 555 (Minn. 1982). In that case, during a break in trial, jurors heard a bailiff comment that “it is all over,” which indicated that the bailiff believed that the defendant was guilty. *Id.* at 557-58. The supreme court stated that “[s]tatements of a court official about the merits of a criminal case raise a rebuttable presumption of prejudice” and that “[t]he burden on the prosecution to rebut the presumption is met only by showing beyond a reasonable doubt that the asserted error did not contribute to the verdict obtained.” *Id.* at 558.

The supreme court recently held that the *Cox* four-factor test does not apply if there is no claim that “the jury was exposed to potentially prejudicial material *outside of the trial*

process.” *State v. Jaros*, 932 N.W.2d 466, 473 (Minn. 2019) (emphasis added). Instead, if a mistrial motion is based on a jury’s exposure to inadmissible evidence *during the evidentiary phase of trial*, the relevant question is whether “there is a ‘reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.’” *Id.* at 472 (quoting *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011)). In answering that question, an appellate court should consider “whether the State presented other evidence on the issue,” “whether the district court issued cautionary instructions,” and “whether the State relied on the inadmissible evidence to make its case during its closing argument.” *Id.* at 474 (quotation omitted). The appellant bears the burden of “establish[ing] a reasonable possibility that the jury would have reached a different verdict had the wrongfully admitted testimony not come in.” *Id.* at 472. An appellate court reviews a district court’s denial of a motion for a mistrial for an abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

In this case, it is unknown whether jurors were exposed to inadmissible evidence. The record is clear that the audio-recording’s reference to child pornography was not played aloud. Jurors could have been exposed to that reference only by reading that portion of the transcript before they were collected. There is no indication in the record that any juror did so. Because Kivi cannot establish that any juror read the pertinent portion of the transcript, he cannot bear his burden of establishing that the jury would have reached a different verdict but for the incompletely redacted transcript.

Even if we assume that jurors saw the reference to child pornography, Kivi could not satisfy his burden of establishing that the jury otherwise would have acquitted him.

The district court instructed the jury to disregard anything they may have read that was not played aloud, and we must presume that they followed that instruction. *See State v. Benton*, 858 N.W.2d 535, 541 (Minn. 2015). The state did not mention child pornography in closing argument. The state presented ample evidence that Kivi committed the alleged criminal acts through the testimony of J.T., R.H.-S., and J.L.

Furthermore, the possible reference to child pornography in this case is less prejudicial than the inadmissible evidence in *Jaros*. In that case, a police officer testified in detail about inadmissible pornographic photographs that were found on the defendant's cell phone, which included depictions of sexual conduct that resembled the state's evidence of the defendant's alleged criminal sexual conduct. *Jaros*, 932 N.W.2d at 469-70. Nonetheless, the supreme court concluded that there was no reasonable possibility that the inadmissible evidence significantly affected the outcome of the trial and that the district court did not err by denying the motion for a mistrial. *Id.* at 474-76.

Thus, we conclude that there is not a reasonable possibility that the jury would have reached a different verdict but for the state's failure to redact a transcript to exclude a reference to Kivi's possession of child pornography. Accordingly, the district court did not err by denying Kivi's motion for a mistrial.

Affirmed.