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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-31

	Opinion Delivered OCTOBER 6, 2010
EDDRICK CHILDS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION
V.	[NO. CR-07-1097]
STATE OF ARKANSAS APPELLEE	HONORABLE HERBERT THOMAS WRIGHT, JR., JUDGE,
	AFFIRMED

KAREN R. BAKER, Judge

On September 9–10, 2009, a Pulaski County jury convicted appellant Eddrick Childs of two counts of rape, as defined in Ark. Code Ann. § 5-14-103(a)(1) (Repl. 2006), and two counts of kidnapping, as defined in Ark. Code Ann. § 5-11-102(a)(4)–(6) (Repl. 2006). He received thirty years' imprisonment for each rape conviction, the sentences to run consecutively, and five years' imprisonment for each kidnapping conviction, the sentences to run concurrently with each other and with the rape convictions. A timely notice of appeal was filed. As his sole point for reversal, appellant argues that the trial court abused its discretion in denying his request to remove juror Vera Gordon and replace her with an alternate because midtrial Mrs. Gordon informed the court that she belatedly realized that she

attended church with the mother of one of the victims. Finding no abuse of discretion, we affirm.

Appellant does not challenge the sufficiency of the evidence; therefore, a detailed recitation of the facts is not necessary. This case arose out of the gang rape of two women that resulted in charges being filed against appellant and four codefendants. Appellant was tried alone. The following exchange took place in open court, outside the presence of the jury.

> COURT: Mrs. Vera Gordon, Juror No. 5, is here, and she's made an observation that something, a response that she didn't realize that she needed to give during voir dire. Mrs. Gordon will you tell them what that is?
>
> JUROR GORDON: I realize that . . . [one of the victims'] mother goes to my church, and I didn't realize that it was her daughter until the second, Miss Layne, called the baby's name. . . . So I didn't know, and when I realized, I thought I needed to tell you.
>
> COURT: Any questions of Mrs. Gordon?
>
> DEFENSE COUNSEL: Questions, Your Honor? No questions, Your Honor.
>
> COURT: Mrs. Gordon, anything about that relationship make you feel like you can't give both sides a fair treatment?
>
> JUROR GORDAN: No, no. I just wanted you to know. I didn't want . . . that to come up and then . . . for some reason it get thrown out or something.
>
> COURT: Did your relationship with her, her –
>
> JUROR GORDAN: Mother.
>
> COURT: –mother–
>
> JUROR GORDAN: This child's mother, but she's been–

> COURT: –give you any, make you believe her more or less than any of the other witnesses you've heard?
>
> JUROR GORDAN: No. No.

After excusing Mrs. Gordon from the courtroom, the discussion continued:

> DEFENSE COUNSEL: At this time, I, for the record, obviously would ask for a mistrial based on her relationship with the victim's mother, and in the alternative, I would at least ask that she be excused and the alternate take her place.
>
> DEPUTY PROSECUTING ATTORNEY: Your Honor, our response would be that obviously the court was concerned about that and asked those questions, and according to the way she answered those questions, she said it would not affect her judgment at all. She just wanted to be forthcoming and let us know about that. So . . . obviously a mistrial's a drastic remedy . . . and we would ask that she be allowed to stay.
>
> COURT: Based on Mrs. Gordon's answers, she wasn't specifically asked about others. . . . She's indicated it's not going to affect her decision one way or the other so your request is noted and denied.
>
> DEFENSE COUNSEL: In regards to that, I believe, and I imagine we could play it back. She did make the comment that she wouldn't want this to affect it and get it thrown out. . . . That concerns me, and I think it's not any prejudice to the court to replace her with an alternate based on that statement.

The court recessed, and back on the record, but still out of the presence of the jury, the discussion continued.

> COURT: Anything we need to address before we bring the jury in?
>
> DEFENSE COUNSEL: I just want to make sure I cover everything on the juror that approached. . . . I just want to make a record of the fact that as the defense we did have one strike left, and had we known that information, we would

> have used that strike. . . . [T]here's an easy fix to this in using the alternate, and just want to make sure that a record's made.

After the defense rested, the trial court again denied appellant's request to have Mrs. Gordon replaced by an alternate. After deliberating, the jury returned the guilty verdicts.

Appellant seeks reversal claiming that Mrs. Gordon evidenced actual bias against him, and thus the trial court abused its discretion in refusing the request to seat an alternate. Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging. Ark. Code Ann. § 16-33-304(b)(2)(A) (Repl.1999).

Appellant bears the burden in overcoming the presumption that jurors are unbiased. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002); *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996). We review the trial court's decision to remove a juror and seat an alternate for an abuse of discretion. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). The burden is on the appellant to prove that a reasonable possibility of prejudice resulted from juror misconduct, and prejudice is not presumed. *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993).

The facts in this case are indistinguishable from *Miller v. State*, 81 Ark. App. 337, 101 S.W.3d 860 (2003), wherein the court said,

> Here, once it was revealed that juror Lewis knew of [the victim's] family, the trial court appropriately inquired as to his ability to continue serving

> as a juror. The court questioned Lewis and also allowed defense counsel and the prosecuting attorney to ask Lewis questions. Lewis indicated that he could set aside his knowledge of the parties, decide the case on the facts, and abide by the law as given by the court. The court found the foregoing factors sufficient to allow Lewis to remain empaneled, determining that there was no for-cause basis under Ark.Code Ann. § 16-33-304 (Repl.1999).
>
> . . . .
>
> There is nothing in this record indicating that the trial court abused its discretion in allowing Lewis to remain on the jury panel, and in matters involving impartiality of jurors, we have consistently deferred to the trial court's opportunity to observe jurors and gauge their answers in determining whether their impartiality was affected. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). Furthermore, there was no showing of prejudice ever made or offered by appellant, as it is not enough that appellant merely shows that the trial court abused its discretion; there must also be prejudice. *See Daugherty v. State*, [3 Ark. App. 112, 623 S.W.2d 209 (1981)].

Miller, 81 Ark. App. at 342–43, 101 S.W.3d at 863.

Appellant relies on *Strickland v. State*, 74 Ark. App. 206, 46 S.W.3d 554 (2001). *Strickland* is inapposite. There, this court affirmed the removal of a juror during trial who failed to inform the court during voir dire that 1) he knew a detective who was a prosecution witness; and 2) he and the detective, in an unrelated matter, had an unpleasant confrontation when the detective arrested the juror's son in his presence. Here, as in *Miller*, the juror came forward thereby giving the court and counsel an opportunity to openly address the matter. Additionally, here, as in *Miller*, defense counsel failed to ask any questions of the juror that would demonstrate the trial court abused its discretion. *See Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992)(after prospective juror stated that she was acquainted with the daughter of the criminal defendant, additional questioning revealed that she would be embarrassed in future encounters with the daughter if she sat as a juror).

Appellant argues that juror Gordon's statement that she did not want the case to "get thrown out or something" in the future establishes prejudice as it shows an expectation that he would be found guilty. However, no one questioned Mrs. Gordon about the meaning of her statement; therefore, her response cannot demonstrate prejudice. *See Gaines v. State*, 251 Ark. 1, 470 S.W.2d 591 (1971) (no reversible error shown because nothing in the record contradicted juror's voir dire statements that she had no knowledge of the facts, no interest in the case, nor an opinion about it even though the facts at trial revealed that the murdered victim was employed by her husband, and that the murder occurred in front of the business building she owned with him as an estate by the entirety).

We hold that the trial court did not abuse its discretion in denying appellant's request to replace juror Gordon with an alternate.

Affirmed.

GRUBER and HENRY, JJ., agree.