STATE OF WISCONSIN
COURT OF APPEALS DISTRICT I
Appeal No. 2022AP001390 CR
Circuit Court Case No: 2016CF002395

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,
Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF

On Appeal from the Judgment of Conviction in the Circuit Court for Milwaukee County, the Honorable David L. Borowski, Presiding

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ISSUE I: Did the trial court's objective bias deny Sills his constitutional right to a fair trial?

The trial court answered: No

ISSUE II: Did the defendant's attorney's deficient performance deny him his right to effective assistance of counsel?

The trial court answered: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral arguments nor publication would be necessary or helpful in this matter.

STATEMENT OF THE CASE

On February 3, 2017, Sills entered a guilty plea to an amended charge of second-degree sexual assault contrary to Wis. Stat. § 948.02(2). Contending he did not understand the proceedings and was rushed into pleading guilty, Sills moved to withdraw his plea prior to sentencing. The Hon. Jeffrey A. Wagner denied his motion and sentenced Sills to 15 years imprisonment—nine years of initial confinement and six years of extended supervision. On appeal, this Court reversed. Applying *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the Court concluded that Sills did not knowingly, intelligently, and voluntarily enter his plea because Judge Wagner failed to inform him of the maximum possible fine. ***State v. Sills***, No.2018191053-CR, unpublished slip op. (WI App Jan. 14, 2020). (80:1-17)

Upon remittitur, the prosecutor declined to renew her offer to amend the charge and with Hon. David L. Borowski now presiding, Sills was found guilty at trial of first degree sexual assault contrary to section Wis. Stat. § 948.02(1)(e). Thereafter, Judge Borowski sentenced Sills to 30 years imprisonment with 20 years of initial confinement and 10 years of extended supervision—more than twice the period of initial confinement imposed by Judge Wagner. During the course of the trial and at the sentencing hearing, Judge Borowski made a variety of comments disparaging this Court's decision permitting Sills to withdraw his earlier plea (the comments with cites to the record are recounted in detail below). Judge Borowski's comments are the subject matter of this appeal.

On January 3, 2022, Sills filed a motion for post-conviction relief and accompanying brief, contending he was denied his constitutional right to a fair trial because, 1) Judge Borowski was objectively biased; and 2) his counsel was ineffective (142:1 and 143:1-14). Judge Borowski denied the motion without a hearing by written decision on July 26, 2022 (162:1-14), and Sills now appeals that decision and asks this Court to vacate his conviction and grant him a new trial.

ARGUMENT

I. Judge Borowski's Objective Bias Denied Sills his Constitutional Right to a Fair Trial.

The Sixth Amendment of the United States Constitution and Article I Section 7 of the Wisconsin Constitution guarantee an accused the right to a fair trial. Encompassed within this right is the right to an impartial judge: "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 US 133 (1955), 137, 75 S. Ct. 623

Judicial bias can be either subjective or objective. Judges are subjectively biased when they have a personal interest at stake, often but not exclusively financial. Objective bias, on the other hand, arises from the appearance of unfairness and does not require proof of actual bias. In *Murchison*, the Supreme Court distinguished the two this way: While fairness "requires an absence of actual bias in the trial of cases," it is also "endeavored to prevent even the probability of unfairness." *Murchison* at 136, citing *Offutt v. United States*, 348 US 11 (1954), 75 S. Ct. 11. Courts scrupulously guard against judicial bias in order "to ensure both the litigants' and the public's confidence that each case has been adjudicated by a neutral and detached arbiter." *Hurles v. Ryan*, 752 F.3d 768, 788 (9th Cir. 2014)

While objective bias cannot be defined with precision, nearly a century ago the US Supreme Court characterized it this way:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.
> *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927)

This language from *Tumey* survives as perhaps the best way to characterize objective judicial bias. The Supreme Court reiterated it in *Murchison*, and even more recently in *Caperton v. A.T. Massey Coal Co.*, 566 US 868 (2009), 129 S. Ct. 2252. Warning against the danger of judicial bias, our own Supreme Court embraced the *Tumey* language just two years ago and reiterated that objective bias occurs when there is "a serious risk of actual bias ... based on objective and reasonable perceptions." *Miller v. Carroll*, 2020 WI 56, ¶44, 392 Wis. 2d 49, 944 N.W.2d 542, citing *Caperton* at 884

Like other states, Wisconsin has also codified objective bias as one of the grounds for disqualification. Wis. Stat. § 757.19 (2)(g) mandates recusal when a judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

Assessing judicial bias is an issue of law that a reviewing court reviews independently. *Miller v. Carroll*, ¶15. While courts are to scrupulously guard against judicial bias, there is a presumption that a judge acts fairly, impartially, and without bias. *State v. Herrmann*, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. In order to overcome that presumption, the party asserting judicial bias has the burden to show bias by a preponderance of the evidence. Id., ¶24 Once established, though, judicial bias claims are not subject to harmless error analysis. (The serious risk of actual bias is a structural error, which is "different from regular trial errors because they 'are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards'." *State v. Pinno*, 2014 WI 74, ¶49, 356 Wis. 2d 106, 850 (2014) (quoting *Puckett v. United States*, 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). See also *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909, 195 L. Ed. 2d 132 (2016) ("[A]n unconstitutional failure to recuse constitutes structural error ....").

The Supreme Court has emphasized that no mechanical definition exists to measure objective judicial bias. Objective judicial bias "cannot be defined with precision" because "[c]ircumstances and relationships must be considered." *Caperton* at 880. "[T]he question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest [or bias or prejudice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, at 883–84, quoting *Withrow v. Larkin*, 421 U.S. 35 at 47, 95 S. Ct. 1456 (1975)

Application of Law

Applying these principles to the facts in this case, it is apparent that Judge Borowski's frequently expressed frustration with this Court's "preposterous" decision (134:28) permitting the defendant to exercise his right to a trial constitutes objective bias. The state's contention in its post-conviction response brief that the court's animus was directed at this Court, and not Mr. Sills (159: 5), is belied by the context in which the Judge Borowski expressed his frustration. When viewed in their entirety, his comments show he was not able

to separate his frustration with this Court's decision from his duty to permit Sills to exercise his constitutional right to a trial. At the very least, Judge Borowski's animus toward this Court's ruling compromises the "litigants' and the public's confidence (that Sills' case) has been adjudicated by a neutral and detached arbiter." *Hurles* at 788.

Within the first few minutes of trial, albeit out of the presence of the jury, Judge Borowski referred to the "tortured and, in my opinion, incorrect interpretation of this entire matter by the Court of Appeals." (128:5) "Yes," the court continued, "they can feel free to read that when this eventually goes back up there." These comments were not made in isolation. They were immediately preceded by his asking the prosecutor if the defendant could have been charged with an offense carrying a mandatory minimum prison sentence. (128:5) Minutes later, commenting on the state's motion to use a videotaped interview of the child, the court stated: "I mean the only reason we're here four years later is because of the defendant's actions and because of the Court of Appeals …" (128:7)

Contrary to Judge Borowski's assertion, the delay was not Sills' fault. Sills waived his right to a Preliminary Examination and never asked to adjourn the trial or any other proceeding. Nor was the delay the fault of the Court of Appeals. It is widely known that both the circuit and appellate courts in this and other states are burdened with demanding caseloads and limited resources. In short, it was not Sills' or the Court of Appeals' actions that explained why a jury was assembled that day; it was because Mr. Sills chose to exercise his constitutional right to a trial.

These comments alone are sufficient to show objective judicial bias, but Judge Borowski carried his frustration into the sentencing hearing: "If Judge Wagner may have glossed over the fine possibility," he offered, "who cares." (29:5-6). His subsequent musing about imposing a fine because of the appellate ruling even though he could not recall having done so on a similar case in the past (43: 9-13) does not inspire confidence either. Nor does his assurance that the ruling "has nothing to do *directly* with my sentence." (emphasis added) (27:16-17). Finally, after surmising that an appeal after a trial "makes sense," (28:1-4) – implying that an appeal after a guilty plea doesn't – Judge Borowski referred to Sills' success on appeal as getting "another kick at the cat" (33:8) because of "an absolute and total

technicality." (28:6)[1]

Actual Bias

While objective judicial bias does not require proof of actual bias (see *State v. Herrmann*, 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772 (2015); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); and *Caperton*, ibid.), an objective bias claim is obviously stronger if actual bias can be shown. The record in this case bespeaks actual bias in at least three respects. [2]

Jury Selection

The first instance of actual bias involves Judge Borowski's interjection affirming the prosecutor's appeal to prospective jurors that they not take into account the absence of DNA evidence:

The Court: And let me just follow up on Ms. Ginsberg's question … In an ideal world, in some cases there would be 25 witnesses and six examples of DNA and 10 fingerprints. That's not the real world. …. You cannot sit there and speculate or wish "well, geez, I wish the State had DNA or I wish they had 'x' or I wish they had a fingerprint." That's not your role. (128:56-57)

The court's interjection was unnecessary and seemingly without purpose since the prosecutor had more than adequately made her point. Rather than rooting out juror prejudice toward either party, the court's comments likely had the opposite effect.

Other Acts Evidence

Judge Borowski's handling of a portion of the state's proffered other acts evidence is a second instance of actual unfairness that affected Sills' right to a fair trial. While

[1] Notwithstanding the trial judge's opinion, Sills' appeal was far from meritless. Testifying at a competency hearing approximately three months before Sills pleaded guilty, a court-appointed forensic psychologist told the court he was "just above the range of mild intellectual disability," had "borderline intellectual functioning," and was prone to "acute anxiety." (Oct 24, 2016 competency hearing, 11:2-23) The record from the February 3, 2017 plea hearing that was the subject of Sills' initial appeal establishes the psychologist's concerns were not unfounded. While this Court's decision focused on the trial court's failure to notify Sills of the maximum possible fine, the record shows Sills was confused throughout the proceeding, telling the trial court he only understood "some things." (Feb 3, 2017 Plea Hearing, 8:4-8) He did not initially understand that the court was not bound by the plea negotiations (3:1-10) and was only "a little bit" sure about what sexual contact meant (6:24-7:5) He requested new counsel immediately before entering his plea (9:7-10) and then reluctantly answered the court's inquiry about how he was pleading: "I guess guilty" (9:11-18)

[2] Sills does not present these instances of actual bias as stand-alone claims, which would subject them to harmless error analysis, as the State appears to assume in its trial court brief. (dckt)

nominally granting his attorney's request to exclude testimony about a highly prejudicial unfounded claim that Sills abused the child years earlier in Tomah, Wisconsin, the court indicated it was understandable if the evidence still came up during the trial:

The Court: I mean should it stay out generally? Yes, but if -- I mean as the defense knows, of course, it's one thing for the State to go to an adult victim and tell them, okay, we're discussing what happened in 2015 and/or 2016 period. We're not going to discuss what allegedly happened in Tomah in 2012. That's entirely different to tell that to a child who is barely 12 years old. (128:12)

The court followed up later:

Let me jump in. Here's my ruling. It should stay out. The State should try to keep it out, but I recognize that you have a very, very young child that's taking the stand, a child that's just turned 12 a couple of weeks ago. So if something occurs at that point in time then it will. (128:13)

Not surprisingly given the court's tepid warning, testimony concerning the highly prejudicial unfounded abuse claims that the court itself had deemed inadmissible seeped into the trial:

Prosecutor: (Child's name), I want to talk about some different specifics or different times. Can you remember a time that your dad had sex with you?

Child: I think it kind of -- I kind of think it all started maybe when I was around three or four. *(The child was x to Y years old when the charged incident occurred)*

Prosecutor: Can you think of a time that your dad had sex with you when you lived in Cudahy?

Child: I don't think I ended up living at Cudahy because I know I ended going to Oak Dale Preschool, and I know that when you start going to preschool when you're like five or four. *(Oak Dale Preschool is located in Tomah, where the unfounded abuse claim occurred.)*
Prosecutor: And can you describe how -- do you remember -- can you think of how old you might have been then?

Child: Maybe four.

(130:10)

That such highly prejudicial evidence inevitably made its way into trial after Judge Borowski's suggestion that the prosecutor "should try to keep it out" does not inspire

confidence that the court was able, in the words of *Tumey*, to "hold the balance between the state and the accused nice, clear and true."

Erroneous Exercise of Discretion in Sentencing

While Wisconsin judges are entrusted with wide discretion in imposing a sentence, due process requires that they limit the basis for their decision on three classical sentencing objectives well known to the Court, **and nothing else**: (1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public. *State v. Gallion*, 270 Wis. 2d 535; *McCleary v. State*, 49 Wis. 2d 263. While qualifying its impact, Judge Borowski admitted that an impermissible factor, his frustration with this Court's ruling, affected his sentencing of Sills: "(The decision) has certainly directly no relationship and indirectly only very little relationship to my sentencing today." (134:28)

The line between considering a trial's emotional impact upon a victim while measuring a defendant's character and punishing him for exercising his right to a trial is admittedly fine. But Judge Borowski's pervasive criticism of the "preposterous" appellate ruling and his admonishing Sills for the appeal's attendant delay suggest he allowed his frustration to interfere with imposing a sentence with the fairness due process requires. As does his weighing whether to impose a fine because of the appellate court ruling even though he could not recall having ever done so on a sexual assault conviction. (134:9-13) His ultimate decision not to fine the defendant does not inspire confidence that he exercised similar restraint when he more than doubled the period of initial confinement imposed by Judge Wagner after his constitutionally defective plea.

II. Sills' Attorney's Deficient Performance Denied him his Sixth Amendment Right to Effective Assistance of Counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must establish two things. First, his counsel's performance must have been so deficient that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. To meet this prong, a defendant must show that counsel's representation fell below an objective standard of reasonableness. Second, counsel's deficient performance must have prejudiced the defendant.

Prejudice in this context means there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)

A. Counsel's Handling of the Unfounded Prior Abuse Claim

Sill's counsel's handling of the extremely prejudicial unfounded prior abuse claim when the child was significantly younger fell below an objective standard of reasonableness, and the errors undoubtedly prejudiced Sills. As noted above, the court's soft ruling excluding the evidence inevitably led to its seeping into trial. Had counsel insisted on a firmer ruling, jurors would not have been exposed to the following highly prejudicial testimony the child gave in response to the prosecutor's open-ended questions. Counsel's failure to object and ask that this testimony be stricken compounded his error, as did his subsequent failure to ask for a curative instruction:

Prosecutor: I want to talk about some different specifics or different times. Can you remember a time that your dad had sex with you?

Child: I think it kind of -- I kind of think it all started maybe when I was around three or four.

Prosecutor: Can you think of a time that your dad had sex with you when you lived in Cudahy?

Child: I don't think I ended up living at Cudahy because I know I ended going to Oak Dale Preschool, and I know that when you start going to preschool when you're like five or four.

Prosecutor: And can you describe how -- do you remember -- can you think of how old you might have been then?

Child: Maybe four.
(130:10)

To make matters worse, Sill's attorney inadvertently "opened the door" to additional damning testimony concerning the inadmissible abuse claim during his examination of the defendant the following day:

Counsel: Do you remember an event or a time when maybe (the child) misunderstood what was happening and thought that you were sexually assaulting her or penetrating her? Do you remember any specific times like that?

Defendant: No, I do not, sir.

Counsel: Can you think of any events or things that happened between you and her that you think "oh, I bet that's what she thinks happened?" Anything that would explain why she's accusing you of these things?

Defendant: Long time ago when she was three, though. Do you want me to explain what happened?

Counsel: No. Let's move on.
(132:15-16)

At that point Sill's attorney, the prosecutor, and the court met in chambers. The content of their discussion was not placed on the record until both parties had rested (132:33-34), but it's clear from the prosecutor's cross examination that the court had ruled defense counsel had "opened the door:"

Prosecutor: You were asked if there's any times that (the child) has been confused before about you sexually assaulting her, correct?

Defendant: Yes, ma'am.

Prosecutor: And you said "yes, when she was three?"

Defendant: Yes, ma'am.

Prosecutor: Because when (the child) was three years old, there was also an allegation and there was also an investigation that you had sexually assaulted her; isn't that correct?

Defendant: Yes, ma'am.
(132: 22)

Counsel's attempt to rehabilitate Sills during re-direct examination allowed the prosecutor to elicit even more damning testimony during re-cross examination:

Prosecutor: And, Mr. Sills, now just briefly about that incident that happened when (the child) was three, that was reported because Jamie Robinson had walked in on you and (the child) underneath bedsheets, and that's why she reported it occurred, right?

Defendant: No, ma'am.

Prosecutor: And that (the child) had referred to her vagina as being hurt and told her mother Jamie "daddy did it," correct?

Defendant: Yes, ma'am.
(132:30-31)

The prejudicial impact on jurors from inadmissible testimony that Sills "had sex" with a three or four year old child cannot be overstated. Fighting what the defendant maintains are false charges that he abused the child when she was seven is an enormous challenge, but when coupled with inadmissible testimony that he also abused her when she was only three or four, it is a nearly impossible task. This highly prejudicial unfounded claim very likely shut down some of the jurors' ability to keep an open mind. Had the jury not been exposed to it, it's unlikely that all 12 jurors would have found Sills guilty.

Counsel also should have objected on the following occasions when the prosecutor vouched for the credibility of the child's mother during her direct examination:

"That was a lot of -- That was a lot of really good information…" (138:31)

"So that was another time that you gave me a lot of really good information, so thank you. (138:34-35)

"Thank you for being honest, and, like I said, saying I don't know, you don't know, that's the right thing to say. That's the right answer because you took the oath when you were here to tell the truth. So thank you for doing that. (138:39)

B. Counsel's Failure to Move for Recusal

As extensively noted above, Judge Borowski expressed extreme frustration with this Court's decision as early as the first morning of trial before the jury was sworn. His comments should have alerted counsel that Sills' right to a fair trial was in jeopardy. Moving for recusal on the morning of trial would undoubtedly not sit well with the court, but as recounted at length above, counsel's failure to do so resulted in the denial of the Sill's constitutional right to a fair trial.

Having not sought recusal before trial, counsel should have done so before the sentencing hearing. Judge Borowski's extensive commentary about the Court of Appeals ruling during the sentencing hearing suggests he was unable to separate its frustration with the ruling from his consideration of what sentence to impose. A harsher sentence after a

defendant "puts the victim through a trial" does not in and of itself prove judicial bias. But Judge Borowski's animus toward the appellate ruling coupled with his faulting Sills for the resultant delay suggests something more was at work in his more than doubling the length of initial confinement than the defendant received after entering a plea. Had counsel sought recusal prior to sentencing, there is a reasonable probability that the defendant would have received a less harsh sentence.

Conclusion

The allegations against Sills, if true, bespeak reprehensible conduct that the state will undoubtedly recite. But it is in these cases that adherence to a defendant's constitutional rights, including the right to a fair trial in front of an impartial judge, must be guarded most carefully. For all of the above stated reasons, counsel respectfully moves the court to grant the defendant a new trial.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b), (bm), and (c). The length of this brief is 15 pages.

Dated this 10th day of November, 2022

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