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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No 2022AP001390-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,
Defendant-Appellant

REPLY BREIEF OF DEFENDANT-APPELLANT

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

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ARGUMENT

I. Sills does not have to show actual unfairness to prevail on his objective bias claim; he need only show that Judge Borowski's extreme displeasure with this Court's decision resulted in the appearance of bias.

While nominally recognizing that Sills' objective bias claim does not require proof of actual unfairness (State's Br. 20.), the State devotes the majority of its argument to asserting that he has failed to do so. It does so by presenting standalone legal analyses of the three issues raised by Sills to show an appearance of unfairness on the part of Judge Borowski[1], arguing that Sills has not met his burden for relief with respect to any of them. (State's Br. 26-30.) But the State's approach is misguided. Sills does not raise these issues as standalone legal claims demanding relief in their own right. Rather, he points to them as evidence that Judge Borowski's extreme displeasure with this Court's decision resulted in the appearance of bias.

The very essence of an objective bias claim is that actual unfairness need not be shown. It is, instead, the appearance of unfairness that the prohibition against objective bias is designed to redress. ("When the appearance of bias reveals a great risk of actual bias . . . a due process violation occurs." *State v. Herrmann*, 2015 WI 84, 364 Wis. 2d 336, ¶ 46; While fairness "requires an absence of actual bias in the trial of cases," it is also "endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 US 133 (1955), 136, citing *Offutt v. United States*, 348 US 11 (1954).

The State's failure to explore whether Judge Borowski' disparaging comments combined with his rulings created the appearance of unfairness is not surprising because objective bias is difficult to measure and even to define. As the Supreme Court put it, "(Objective bias) cannot be defined with precision" because "[c]ircumstances and relationships must be considered." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009) 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

[1] Sills suggested that Judge Borowski's handling of the following issues suggested an appearance of unfairness: the judge's comment during *voir dire*; his ruling on the State's proposed other acts evidence; and his sentencing of Sills. (Sills' Br. 9-11.)

must be forbidden ….” *Caperton*, at 883–84, quoting *Withrow v. Larkin*, 421 U.S. 35 at 47, 95 S. Ct. 1456 (1975). Our own Supreme Court put it this way: “the appearance of bias offends constitutional due process principles whenever a reasonable person —taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to ‘hold the balance nice, clear and true’ under all the circumstances.” *Herrmann*, 364 Wis. 2d 336, ¶ 32, citing *State v. Gudgeon*, 295 Wis.2d 189, ¶ 20 and *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

The following excerpt from the *Caperton* decision, necessarily lengthy because of the ambiguity of subject, delves further into the nature of objective bias and why a judge’s own analysis of whether he is biased is an insufficient measure:

> Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921).
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> The judge inquires into reasons that seem to be leading to a particular result. Precedent and stare decisis and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.
>
> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey*, 273 U. S., at 532; *Mayberry*, 400 U. S., at 465-466; *Lavoie*, 475 U. S., at 825. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "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." *Withrow*, 421 U. S., at 47.

Caperton, 883-884.

The Court in *Caperton* went on to conclude that objective bias had been shown on the facts of that case despite the view of the West Virginia State Supreme Court of Appeals Justice involved who had undertaken his own "extensive search for actual bias." "Due process," the Court explained, 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Caperton* at 886, citing *Murchison*, at 136.

Applying these principles to the facts and circumstances in the instant case, the Court must not exhaust its analysis, as the State appears to do, by considering only the stated reasons for the Judge Borowski's conclusions and rulings. As noted in the excerpt from *Caperton* included above, "There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work." (from *Caperton* excerpt included above.) This Court may not reach the same conclusion that Sills does, but it must ask whether, "under a realistic appraisal of psychological tendencies and human weakness," the extreme animus exhibited by Judge Borowski toward this Court's decision would "offer a possible temptation to the average man as a judge … not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

In its response at both the trial court level and now in this Court, the State also argues that Sills has failed to show that Judge Borowski's animus toward this Court's prior ruling resulted in unfairness or bias against Sills, as opposed to the Court of Appeals. [From the State's response to Sills' post-conviction motion: "Perhaps the defendant would have a stronger argument if the court of appeals was standing trial before Judge Borowski in this case, but nothing in the Judge's comments show objective bias against the defendant himself." (R. 159:5)]; and [From the State's appellate brief: "Sills must show not only that the circuit court disagreed with the court of appeals' decision, but also that the court harbored ill-will toward him for exercising his right to appeal." (State's Br. 22.)]. Sills stands by his analysis above and his initial brief's detailed analysis of the record, including Judge Borowski's comment minutes after disparaging

this Court's decision that, "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 …" [(Sills Br. 8, citing (R. 128:7)]

Finally, the State argues that Sills forfeited his objective bias claim by not raising it "contemporaneously," by which the State presumably means at trial or before the sentencing hearing (State's Br. 21.) (Sills, of course, did raise objective bias at the trial court level in his postconviction motion for relief.) But forfeiture is a rule of judicial administration, and whether to apply the rule is a matter addressed to the Court's discretion. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7. Courts have overlooked forfeiture where: "the issue is one of law, the facts are not disputed, the issue has been thoroughly briefed by both sides, and the question is one of sufficient interest to merit a decision." *City News Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 20-21, 487 N.W.2d 316 (Ct. App. 1992). Sills submits that each of these factors is present in his case. Forfeiture has also been overlooked in claims raising a constitutional right, as Sill's Sixth Amendment claim does, when "it appears in the interests of justice to do so and where there are no factual issues that need resolution." *State v. Marshall*, 113 Wis. 2d 643, 653 (citations omitted). Finally, "some errors are 'so plain or fundamental' that they cannot be forfeited and will be considered on appeal despite the absence of an objection." *State v. Marinez*, 2011 WI 12, ¶49, citing *State v. Davidson*, 2000 WI 91, ¶ 88. Sills' claim is fundamental in that a biased court infects the entire proceedings, including the most impactful ones—the trial and the sentencing hearing. Worthy of note in this regard is that judicial bias claims are not subject to harmless error analysis because they involve 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 (2016) ("[A]n unconstitutional failure to recuse constitutes structural error ....").

II. Sills alleged sufficient facts in his postconviction motion to warrant an evidentiary hearing on his ineffective assistance of counsel claim.

To reiterate, Sills' ineffective assistance claim rests on one, counsel's deficient performance in his handling of an unfounded prior abuse claim; and two, his failure to move for Judge

Borowski's recusal. The State maintains that Sills failed to allege sufficient facts for an evidentiary hearing with respect to both the deficient performance and the prejudice prongs on each of his claims. (State's Br. 30-34.)

Unfounded abuse claim

The State argues counsel's performance was not deficient in his handling of the unfounded abuse claim because the trial court properly exercised its discretion in ruling on the State's other acts motion; thus, any objection, request to strike testimony, or attempt to clarify the court's ruling would have appropriately landed on deaf ears. (State's Br. 32.)

But as recounted in Sills' initial brief, the court's ruling was anything but clear. (Sill's Br. 9-10.) While nominally excluding testimony about what the court deemed a "non-substantiated" claim, where "if anything occurred, it was now eight or nine years ago" (R. 128:14.), the court, in the State's words, "acknowledged that the 12-year-old victim might nonetheless volunteer information about these incidents … and appeared to suggest that it would not intervene to prevent her from offering such testimony." (State's Br. 27, citing R. 28:11–12.) Indeed, as the State pointed out, Judge Borowski confirmed that, had defense counsel objected when the child volunteered at trial that the abuse started when she was three or four, the court would have denied the objection. (State's Br. 28, citing R. 162:12)

The trial court's casual approach to an unfounded and extremely damning allegation that the court, itself, had deemed inadmissible is astonishing—as is the State's embracing it to argue that trial counsel's performance was not deficient.[2] The prejudicial impact on jurors from inadmissible testimony that Sills "had sex" with a three or four-year-old child cannot be overstated.

The State also excuses trial counsel's failure to object and move to strike when the excluded evidence inevitably made its way into trial, claiming that counsel could not have anticipated the child's "volunteered" testimony and the Court would have overruled his objection anyhow.

[2] From the State's brief: "The court's decision to deny the State's request to admit evidence of the prior allegations of abuse, while **declining to silence the child victim** if she volunteered testimony about these instances, was not an erroneous exercise of discretion." (emphasis added) (State's Br. 28.)

(State's Br. 27-28.) But Judge Borowski's tepid suggestion that the prosecutor "should try to keep it out" (R. 128:13) should have alerted counsel to the risk, especially given the prosecutor's open-ended question that elicited the child's response. The prosecutor asked, "I want to talk about some different specifics or different times. Can you remember a time that your dad had sex with you?" To which the child responded: "I think it kind of -- I kind of think it all started maybe when I was around three or four." (R. 130:10.)

The State stretches credulity even further in its defense of trial counsel's "opening the door" to additional damning testimony about the unfounded prior abuse allegations when he asked Sills: "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?" To which Sills eventually responded: "Long time ago when she was three, though. Do you want me to explain what happened?" (132:15-16)

Speculating that trial counsel's question was "meant to elicit testimony consistent with Sills's [*sic*] statement in the jail call—Elizabeth was mistaken about being assaulted because it was an accident," the State argues that counsel "could not have reasonably foreseen that Sills would instead offer testimony that would permit the State to question him about prior allegations of assault." (State's Br. 32.) [3]

The State's speculation is not only unfounded on its face, it is also at odds with how the prosecuting attorney apparently viewed counsel's question. On recross-examination, the prosecutor engaged in the following exchange with Sills:

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.
(R. 132: 22)

[3] **In his decision, Judge Borowski adopted the State's speculation about Sill's attorney's question. (R. 162: 12-13.)**

Regardless of what answer counsel intended to elicit, it comes as no surprise that his open-ended question posed to a client who, according to a court-appointed forensic psychologist, possessed "borderline intellectual functioning" (R.35:11), badly backfired. Counsel's deficient performance, along with the court's ruling that he had opened the door, allowed the prosecutor to impart to the jury an unfounded damning claim of abuse that the Court itself had earlier ruled inadmissible.

Efforts to develop modern evidentiary rules addressing the difficulty of very young child abuse victims to place events in time are laudable. As the State pointed out in its response at the trial court level, "A person should not be able to escape punishment for such a ... crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such ... activity." [(R: 159:6, citing *State v. Sirisun*, 90 Wis.2d 58, 65–66 (Ct.App.1979)]. But no matter how viscerally abhorrent child sexual abuse allegations are, a citizen's constitutional right to a fair trial, including effective representation to ensure that an unsubstantiated allegation of sexual assault of a three or four-year old child does not seep its way into trial, must not be abandoned. In fact, it is in these types of cases that a defendant's constitutional right to a fair trial must be most closely guarded. Fighting what Sills 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.

Recusal

The State maintains that trial counsel's failure to move for Judge Borowski's recusal does not constitute deficient performance because "counsel had little basis on which to seek recusal." (State's Br. 34.) Sills obviously disagrees with the State's conclusion but he will not repeat what he has explored in depth in his initial brief and above. The State also contends that Sills cannot show prejudice because "the court would have appropriately denied a motion for recusal" and Sills can only speculate that another judge would have imposed a less harsh sentence. (State's Br. 34.) The State's circular reasoning aside, for the reasons exhaustively stated above and in Sills' initial brief, he disagrees that the court's denial of a recusal motion would have been appropriate. As for only speculating how an unbiased judge might sentence

him, Sills would be placed in an impossible position if he had to predict how an unknown judge might sentence him on any particular day.

Conclusion

For all the reasons stated above and in his initial brief, Sills again respectfully requests that the Court grant him a new trial.

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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 2,956 words.

Dated this 11th day of February 2023.

Electronically signed by:
Michael C Griesbach

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.

Electronically signed by:
Michael C Griesbach