STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP002124 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD LEO MATHEWSON,

Defendant-Appellant.

On notice of appeal from a judgment
entered in the Brown County Circuit Court,
the Honorable Beau G. Liegeois, presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

During voir dire at Richard Mathewson's trial, a prospective juror indicated that she had a "feeling of bias or prejudice" about the case. When questioned, she said she did not know if she could decide the case based only on the evidence because of her feelings about the nature of the accusations. The court and then the prosecutor instructed her on a citizen's duty to serve and a juror's role in a criminal trial; they asked her repeatedly if she could fulfill this obligation. The juror never indicated that she thought she was able; she would only say she would "try" and "do my best" to be impartial. She eventually served on the jury that convicted Mathewson.

Did the circuit court commit clear error in finding the juror not subjectively biased?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is merited.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The state charged Richard Mathewson with one count of repeated sexual assault of a child. (25). The allegations were that over a period of two years, Mathewson had repeatedly fondled a girl between the ages of eight and nine years old. The girl was the niece of a woman who lived in the same apartment building as Mathewson; the woman's daughter and her cousin would come visit Mathewson in his apartment and watch television. (2:2-3).

About three years later, the girl told a therapist that Mathewson had assaulted her. (104:82-83). The therapist reported this to the sheriff's department, and they arranged for a forensic interview of the girl. (2:2). During this interview, the girl said that when she would watch television in Mathewson's apartment, he would direct her to sit on his lap, and would then touch her breasts, buttocks and vagina both over and underneath her clothing. (2:2).

A sheriff's deputy interviewed Mathewson in his apartment; Mathewson acknowledged the visits and that the girl would sometimes sit on his lap, but denied ever touching her sexually. (2:8).

The case was tried to a jury. At the beginning of voir dire, the prosecutor read the information to the potential jurors, informing them of the offense charged and the age of the alleged victim. (103:16). Shortly afterward, the court asked the panel if anyone felt "that they have feelings of bias or prejudice based on

what you know so far?" (103:20). Several jurors raised their hands. (103:20). The court noted that "jurors are required to be impartial and unbiased and to make the decision on the facts of the case," and were not responsible for any other matters. (103:20). It then repeated its question about bias or prejudice; six prospective jurors again raised their hands. (103:20).

The court held a sidebar with counsel. (103:20-21). Afterward, it addressed the panel again, informing its members of the presumption of innocence, the state's burden of proof beyond a reasonable doubt, and the requirement that the jurors be fair, impartial, and unbiased. (103:21). The court then asked for a third time whether any jurors harbored bias or prejudice. (103:21). Several again raised their hands. (103:21-23). When individually questioned in open court, five jurors said they could not be impartial. (103:21-23).

The court conducted individual voir dire with each of the latter five jurors in chambers, as well as a sixth juror (Juror Georgia). (103:23,32). Five of the six were struck for cause. (103:23-43). The final one (Burnell) was not struck, but did not sit on the jury. (103:53; 65).

The court summoned five new panel members to replace those struck. (103:55). When the court asked if anyone had a "feeling of bias or prejudice in the outcome of this case," one of the new panelists, Juror Hilscher, raised her hand. (103:56; App. 4).

The court addressed her: it said she had a "civic duty" to be a juror and again described the presumption of innocence and the burden of proof. It then asked her again if she could be fair, impartial, and unbiased, to which she responded "I honestly don't know." (103:56; App. 4).

The court again held an in-chambers individual voir dire. It reminded Hilscher again of the burden of proof, and told her that as "a citizen of the United States of America" she had "a duty to sit on a jury." (103:57; App. 5). It asked her if, knowing nothing of the case but the charge, she was "able to sit as a juror, listen to the evidence, evaluate it, and make a decision on the facts at the end?" (103:57; App. 5). She responded "I honestly don't know. When I hear sexual assault of a child, it breaks my heart." (103:57-58; App. 5-6).

The court observed that such a feeling was not an uncommon one, and asked her if she'd nevertheless be able to listen to its instructions, including about the presumption of innocence and burden of proof, and then perform her duty. She responded: "Yeah. I know what you are saying, but I don't know. I don't know if I could. I hear that and—it's not right, but I can't help it." (103:58; App. 6).

The court asked the prosecutor if he had any follow-up. The prosecutor reiterated that "everyone feels strongly against sexual assault of children" and said that was why it was illegal and carried consequences. But, he added, those

consequences are up to the judge, and the jury decides only the facts. (103:58; App. 6). He asked Hilscher whether she could set aside her feelings and determine the facts, to which she replied "I could try. I could try." (103:59; App. 7).

The prosecutor asked Hilscher if she would be more likely to believe "the crime victim"; she responded repeatedly that she did not know. (103:59; App. 7). The prosecutor suggested that one reason Hilscher didn't know was because she hadn't heard any facts, which Hilscher agreed was true. (103:59; App. 7). The prosecutor asked Hilscher to "acknowledge that it's important" to be fair and impartial in deciding the case, to which Hilscher again responded "I could try." (103:59; App. 7).

Hilscher denied ever having been sexually assaulted, but said she knew it "damages the lives of the innocent." (103:59-60; App. 7-8). The court said this awareness didn't disqualify her from having to be a juror, which she said she understood. (103:60; App. 8). The voir dire then concluded:

> THE COURT: So would you be able to listen to the instructions from the judge, which is the obligation of a juror—a
>
> PROSPECTIVE JUROR HILSCHER: Um-hum.
>
> THE COURT: — and apply them to what you're hearing in the courtroom which is what—remember you have a civic duty to act as a juror. Would you be able to listen to the

> instructions and apply the instructions to what you are hearing in the court?
>
> PROSPECTIVE JUROR HILSCHER: I'll try.
>
> THE COURT: But you understand if you got selected as a juror, you'd be required to do that?
>
> PROSPECTIVE JUROR HILSCHER: I'll do my best. I'll do my best.
>
> THE COURT: Attorney Mongin, I'll go to you.
>
> MR. MONGIN: I guess I have no further questions, Your Honor.

(103:60; App. 8).

After Hilscher was excused from the room, Mathewson's counsel asked that she, too, be removed for cause, saying "she seemed to start from the premise that sexual assault damages lives and that's why she would have a hard time maybe following the directions" and that she was "presuming guilt." (103:61; App. 9). The state opposed, saying that negative feelings about sexual assault are widely shared, and that nothing Hilscher had said "suggests that she was predisposed to make a certain decision." (103:62; App. 10).

The court declined to remove Hilscher for cause. Referring to the prosecutor's argument, it said

> I think I agree with that analysis. I do think that it is similar to Mr. Burnell, that she understands the obligation of serving as a

> juror and that she's required to follow the judge's instructions. She wasn't nearly as emotional as some of the previous jurors that we talked to in here. We had a juror that was basically crying back here, and Ms. Hilscher wasn't near—it wasn't even close to that. I do think that it was significant she stated she didn't know and then acknowledged that she doesn't know because she doesn't know any of the evidence either. So I think that is significant to her ability to be impartial and unbiased and then—I mean her concluding with her saying that she is going to do her best, I think that is what probably 99 percent of people would say from the community when they come onto the jury. They are total strangers to the legal process, so courtroom procedures to trials, and I think a lot of people would have the same comment, that they are going to do their best to evaluate the evidence and make a decision. So I'm not going to release her for cause.

(103:62-63; App. 10-11).

Voir dire continued; no additional questions were directed at Hilscher, and she did not speak again. (103:63-101). She sat on the jury. (65). The jury convicted Mathewson, and the court sentenced him to 15 years of initial confinement and 10 years of extended supervision. (78).

ARGUMENT

I. Juror Hilscher's voir dire responses demonstrated bias, and the circuit court's finding to the contrary was clearly erroneous.

A. General principles

The right to a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 7 of the Wisconsin Constitution. *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). To be impartial, a juror must be "indifferent" and capable of basing his or her verdict upon the evidence developed at trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The seating of even one biased juror is a structural error requiring reversal. *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

The requirement that a juror be "indifferent" is also codified at Wis. Stat. § 805.08(1). The statute requires the circuit court to examine on oath each person who is called as a juror to discover if he or she "has expressed or formed any opinion, or is aware of any bias or prejudice in the case." The statute further directs that "if a juror is not indifferent in the case, the juror shall be excused." *Id.*

There are three types of juror bias: statutory, objective, and subjective. *Faucher*, 227 Wis. 2d at 716. Subjective bias—the type of bias relevant here—is the

type "revealed by the prospective juror on *voir dire*: it refers to the prospective juror's state of mind." *Id.* at 717. Because a circuit court sits in a "superior position to … assess the demeanor and disposition of prospective jurors," this Court will uphold the circuit court's factual finding of bias or the lack thereof unless it is clearly erroneous. *Id.* at 718.

B. Juror Hilscher's responses demonstrated subjective bias

Juror Hilscher was subjectively biased, and should not have served on the jury. When the panel was asked if anyone had a "feeling of bias or prejudice in the outcome of this case," she raised her hand, indicating that she had such a feeling. (103:56; App. 4). The court told her she had a "civic duty" to be a juror and outlined the presumption of innocence and the state's burden of proof (Hilscher would also have heard this earlier, when the court was addressing other panel members). But when the court again asked her if she could be fair, impartial, and unbiased, she replied "I honestly don't know." (103:56; App. 4).

After the court moved the proceedings to chambers, it again told Hilscher that as "a citizen of the United States of America" she had "a duty to sit on a jury." (103:57; App. 5). Nevertheless, when it again asked her if she could decide the case based solely on the evidence, she replied "I honestly don't know. When I hear sexual assault of a child, it breaks my heart." (103:57-58; App. 5-6). The court asked her again if she could decide the case in accord with the law, and she

said "Yeah. I know what you are saying, but I don't know. I don't know if I could. I hear that and—it's not right, but I can't help it." (103:58; App. 6).

The prosecutor then joined in, telling Hilscher her role would be to consider only the facts, not what any consequences would be. He asked her if she could do this, to which she responded that she "could try." (103:58-59; App. 6-7). The prosecutor asked Hilscher if she would be more likely to believe "the crime victim"; she responded three times that she did not know. (103:59; App. 7). For the remainder of the voir dire, she responded only "I could try," "I'll try," and "I'll do my best" when asked if she could be unbiased. (103:59-60; App. 7-8).

The trial court's finding that Hilscher was not subjectively biased was clearly erroneous. Her initial answers indicated her belief that she could not be fair, and none of her later answers offered any reason to think she was wrong. The court's ruling offered three reasons it didn't believe Hilscher was biased; none hold water.

First, the court adopted the prosecutor's claim that nothing she said suggested "that she was predisposed to make a certain decision in a certain way." (103:62; App. 10). This isn't so. Hilscher indicated at the outset of questioning that she had a "feeling of bias or prejudice in the outcome" of the case. She said she "honestly [didn't] know" if she could be impartial and hold the state to its burden. (103:56; App. 4). Asked again if she could make a decision on

the evidence presented, she said she didn't know, and that hearing of sexual assault of a child "breaks my heart." (103:56-57; App. 4-5). And, asked if she was more likely to believe the "crime victim" due to the nature of the allegations, she repeatedly said she did not know. (103:59; App. 7).

The clear import of all these statements was that the nature of the allegations against Mathewson made Hilscher question whether she could decide the case on the facts or fairly evaluate the credibility of the complaining witness. Subjected to direct, repeated questioning, at no point did Hilscher say that she believed she could serve impartially; in fact, she said she did not know if she could hold the state to its burden. All of this indicates a "predisposition to decide" the case against Mathewson.

Second, the court said Hilscher's statement that she would "do her best" was a typical response from a potential juror, as jurors are usually laypeople unfamiliar with the trial process. (103:62-63; App. 10-11). This may well be. "[A] juror is not required to 'give unequivocal assurances' that they would be able set aside any opinion or prior knowledge." *State v. Kiernan*, 227 Wis. 2d 736, 750 n.10, 596 N.W.2d 760 (1999). And this Court has held that a juror's response of "I'll try" when asked if he can be impartial does not conclusively demonstrate bias. *State v. Oswald*, 2000 WI App 3, ¶19, 232 Wis. 2d 103, 606 N.W.2d 238. The problem is that Hilscher never expressed *any* belief—equivocal or otherwise—that she'd be able to put aside her feelings and decide the

case fairly. To say that one "can try" to perform some task is not to express any belief that one will succeed. A casual chess player might reasonably agree to "try" to win a match against a grand champion; this wouldn't mean he or she thought this outcome likely.

Though a prospective juror need not give an "unequivocal assurance" of impartiality, this isn't the same as saying they can fail to give *any* assurance of impartiality. *See State v. Ferron*, 219 Wis. 2d 481, 501, 579 N.W.2d 654 (1998), *abrogated on other grounds by State v. Lindell*, 2001 WI 108, ¶40, 245 Wis. 2d 689, 629 N.W.2d 223 (while "the juror need not affirmatively state that he or she can 'definitely' set the bias aside" a "juror's final word of 'probably' is insufficient" to assure impartiality).

Oswald is illustrative. One of the jurors there, Paul A., was asked if he could decide the case solely on the evidence presented, rather than what he'd learned due to pretrial publicity. He said "I would try to do my best." This Court held that the circuit court had not erred in failing to strike Paul A. for cause. 232 Wis. 2d at 118-19. But "trying to do his best" was not the only—or best—assurance that Paul A. gave; it was one of many responses. When asked directly if he would decide guilt or innocence based only on the evidence, he responded with a flat "yes."[1] Here, by contrast, Hilscher—despite being asked repeatedly by both the court and the prosecutor—never once said she'd do

[1] *Oswald*, App'x of Defendant-Appellant, v. II, tab 11, p.12, *available at* https://repository.law.wisc.edu/s/uwlaw/media/201064

anything but "try" to overcome the prejudice she feared she harbored. *See Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001) ("When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases and her prejudicial personal experiences and render a fair and impartial verdict.").

Finally, the court noted that Hilscher was relatively calm. It commented that she "wasn't nearly as emotional as some of the previous jurors," referring to the six who'd previously had individual voir dire. The court particularly recalled "a juror that was basically crying back here, and Ms. Hilscher … wasn't even close to that." (103:62; App. 10). Certainly, a judge's observation of a juror's demeanor is a proper part of the bias inquiry. But this juror asserted that she was biased, and then was unable to do more than say she would "try" to decide the case fairly. Hilscher's *words* conveyed—and then failed to disclaim—that she didn't know if she could be impartial. These words—whether delivered placidly or in agitation—showed bias.

As the prosecutor and the circuit court observed, negative feelings about child sexual assault are nigh universal. They don't preclude jury service, provided a candidate can give assurances that these emotions will not interfere with the obligation to be impartial, decide the case on the evidence, and apply the proper burden of proof. The five jurors the court properly excused for cause before Hilscher couldn't provide such

assurances. Neither could she. Her service on Mathewson's jury deprived him of a fair trial.

CONCLUSION

Because the circuit court erred in permitting a biased juror to sit on the jury, Richard Mathewson respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

Dated this 13th day of March, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,012 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of March, 2023.

Signed:
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