

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 8, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP1682-FT**

**Cir. Ct. No. 2004FO2109**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**WAUPACA COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY L. WINTERS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for  
Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.<sup>1</sup> Terry L. Winters appeals a judgment of conviction for public assistance fraud entered upon a jury verdict and an order denying his motion for a mistrial. Winters argues the trial court erroneously exercised its discretion by denying his motion for mistrial because one of the jurors was objectively biased. We conclude the trial court properly denied Winters' motion for mistrial. We affirm.

### FACTS<sup>2</sup>

¶2 Winters was tried before a jury for public assistance fraud. During the course of the trial, Winters moved for mistrial arguing one of the jurors was biased. The trial court denied Winters' motion and the jury found Winters guilty. The following facts are taken from the record and the briefs submitted by the parties upon appeal.

¶3 At the opening of the trial, Waupaca County did not introduce its witnesses to the jury. The court did not ask either party to announce or introduce their anticipated witnesses. In total, the County called five witnesses. The second witness called by the County was Winters' former wife, Sondra Rierson. She and Winters had joint custody and shared placement of a minor son pursuant to a divorce judgment. The County called Rierson to testify regarding whether their son was with Winters approximately one-half of the year as Winters had stated on his application for public benefits.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> The fact sections of both parties' appellate briefs contain few citations to the record. This is a violation of WIS. STAT. § 809.19(1)(d) and (3)(b) of the rules of appellate procedure which requires parties to set out facts "relevant to the issues presented for review, with appropriate references *to the record*." (Emphasis added.)

¶4 As soon as Rierson was sworn in and seated, juror Nevada Martz raised her hand and announced to the court, “I believe I know her mother-in-law.” Both counsel agreed to continue the trial despite Martz’s statement. However, almost immediately thereafter, counsel for Winters requested a brief voir dire of Martz.

¶5 Voir dire proceedings occurred in chambers with the judge, both counsel, Winters and Martz. Martz stated she had worked with Rierson’s mother-in-law, Donna Rierson,<sup>3</sup> for approximately two years. After they ceased working together, Martz would socially visit Donna approximately once every one or two months. Martz indicated she had not discussed the case with Donna nor did she have any previous knowledge of the case. Martz also indicated she did not know Rierson or Winters but that she recognized Rierson from some pictures she had seen.

¶6 Counsel for Winters, Mark Morrow, began the voir dire questioning. Particularly relevant to this appeal is the following line of questioning from the voir dire proceedings:

Morrow: If this case came down to believing [Winters] or believing [Rierson] about various issues, would you, because of your relationship with Donna, would you be inclined to believe one witness over the other?

Juror Martz: Well, I haven’t heard [Rierson’s] statement yet.

Morrow: But before hearing it?

Juror Martz: I would have to say yes, because I’m not quite sure.

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<sup>3</sup> For simplicity sake, Donna Rierson will be referred to throughout this opinion as Donna.

Morrow: That you would be more likely to believe [Rierson] just because you know her?

Juror Martz: Yes.

Later in the voir dire, the judge asked Martz if she would follow whatever instructions he gave in this case and she responded that she would.

¶7 Winters moved for mistrial immediately after the voir dire proceedings. In denying the motion, the judge stated:

When you introduced yourself and your witnesses, you could have listed who all the other witnesses were too. Maybe that would have triggered her recollection ... I suspect it would have .... And more importantly, I think, however, I know what she said. I also thought that that was, you know, the response of somebody who was unsophisticated in the system. And when I asked her if she would follow my instructions, she said she would. So I am satisfied that she will be able to fairly assess the evidence in this case and follow the instructions as they are given to her.

Finally, the judge concluded that the facts and circumstances of the case did not indicate Martz was biased:

And, quite frankly, I don't think that there is any significant bias or prejudice in any respect. She didn't know anything about this case. She never talked to the mother-in-law of this witness about this case. She didn't even know who the defendant was. So the fact that she knows a relative by marriage of this particular witness and has never heard anything about this case, I think that that speaks to her ability to be fair and impartial, and her indication that she would follow the instructions. So I am satisfied that there is no basis to strike her.

The trial continued after the judge denied Winters' motion for mistrial and ultimately the six-member jury panel rendered a five-sixths verdict convicting Winters of public assistance fraud. Winters appeals the trial court's denial of his motion for a mistrial.

## DISCUSSION

¶8 Winters argues Martz was objectively biased because she indicated she would believe Rierson over Winters in a credibility contest. The County contends Martz was not objectively biased because Martz was lacking the required “direct, critical, personal connection” with the crucial evidence. *See State v. Oswald*, 232 Wis. 2d 103, 113, 606 N.W.2d 238 (Ct. App. 1999). The trial court found there was no prejudice and Martz had demonstrated the ability to be fair and impartial. We agree with both the trial court and the County.

¶9 Whether to grant a motion for mistrial is a decision committed to the sound discretion of the trial court. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). “The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial.” *Id.* We will not reverse the trial court’s decision regarding a motion for mistrial unless the trial court has erroneously exercised its discretion. *See id.* “A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.” *Id.* at 506-07.

¶10 In this case, the trial court denied Winters’ motion for a mistrial because it found juror Martz was not biased. Whether a juror is objectively biased is a mixed question of fact and law. *State v. Faucher*, 227 Wis. 2d 700, 720, 596 N.W.2d 770 (1999). The trial court’s determination of objective bias will be reversed only if, as a matter of law, a reasonable judge could not have reached the same conclusion. *Oswald*, 232 Wis. 2d at 111. This standard provides a degree of deference to the trial court. *Id.* We employ this deferential standard because the

trial court's conclusion on the question of law of whether the facts add up to objective bias is intertwined with the supporting factual findings. *Id.*

¶11 A criminal defendant is guaranteed the right to a fair trial by a panel of impartial jurors under both the United States Constitution and the Wisconsin Constitution. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. “To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.” *Faucher*, 227 Wis. 2d at 715. Where a juror is not indifferent in the case, the juror shall be excused. WIS. STAT. § 805.08(1).

¶12 In *Faucher*, the Wisconsin Supreme Court defined three types of juror bias requiring a juror be excused from a case: statutory bias, subjective bias, and objective bias. *See Faucher*, 227 Wis. 2d at 706. Relevant to this appeal, *Faucher* defines objective bias<sup>4</sup> as the inquiry into “whether the reasonable person in the individual prospective juror’s position could be impartial.” *Id.* at 718. A trial court is to consider the facts and circumstances surrounding the voir dire as well as the facts involved in the case. *Id.* The focus of inquiry is not upon the individual juror’s state of mind; rather, the emphasis of the assessment remains upon the reasonable person. *See id.* at 719.

¶13 In *Faucher*, the court found a juror was objectively biased because the juror possessed strong beliefs regarding the state’s crucial witness. *Id.* at 735. The juror was personally acquainted with the witness as she was his former next door neighbor of four years. *Id.* at 730. On three occasions during the special voir dire, the juror stated he believed the witness’ credibility was unimpeachable. *Id.*

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<sup>4</sup> Winters argues Martz was objectively biased, thus we need only examine objective bias.

at 730. This was problematic because the case essentially boiled down to a credibility contest between the witness, who was the state's only eyewitness, and the defendant. *Id.* at 733. However, the record in *Faucher* indicated the juror was a reasonable person and he was sincerely willing to set aside his opinion. *Id.* at 731. Despite the juror's sincere intentions, the supreme court found the juror was objectively biased because no reasonable person in the juror's position would be able to set aside such deeply held beliefs where the witness provided crucial evidence in the case. *Id.* at 735.

¶14 The County looks to *Oswald* for the definition of an objectively biased juror. In *Oswald*, the court examined *Faucher* and stated the "exclusion of a juror for objective bias requires a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case to be tried or the juror's intractable negative attitude toward the justice system in general." *Oswald*, 232 Wis. 2d at 113. According to the County, the direct, critical, personal connection is missing in this case and Rierson's testimony is not the most crucial evidence admitted at trial. We agree.

¶15 Winters relies entirely upon *Faucher* and argues that a finding of objective bias in this case is required under *Faucher*. We disagree. This case is factually distinguishable from *Faucher*. First, in *Faucher*, the juror personally knew the testifying witness. *Faucher*, 227 Wis. 2d at 730. Here, Martz did not know Rierson but knew only her mother-in-law. Secondly, in *Faucher*, the juror exhibited strongly held beliefs that the witness was "a girl of integrity" and believed she would never lie. *Id.* at 732. Here, Martz did not express or exhibit deep-seated beliefs. In fact, quite the contrary; when first asked whom she was more likely to believe, Martz responded she had not heard any statement yet, indicating she was waiting to hear the statements before deciding who to believe.

Third, unlike the witness in *Faucher*, Winters has not demonstrated that Rierson provided the most crucial evidence at trial. Winters was not pitted in a credibility contest with Rierson; the County relied upon five witnesses in total. Based upon the totality of the facts and circumstances, we conclude Martz was not objectively biased.

¶16 The voir dire transcript indicates that the judge considered the totality of the facts and circumstances and properly concluded Martz was not biased and no prejudice would result by leaving her on the jury panel. The judge applied the appropriate standard in determining whether to grant a motion for mistrial and appropriately denied the motion based on a lack of prejudice.

¶17 Finally, Winters suggests the judge should not be accorded the usual deference in this case because the judge exhibited prejudice against him. Winters claims the judge's statements at sentencing, made after the verdict and outside the presence of the jury, indicate the judge had strongly held beliefs against him.<sup>5</sup> Thus, Winters claims the judge's prejudice came into play when the judge determined that the trial should continue despite Martz's bias. However, Winters' argument is not fully developed and, as such, we need not address his argument. See *Estrada v. State*, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). We affirm the judgment and order.

*By the Court.*—Judgment and order affirmed.

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<sup>5</sup> Winters does not argue that the judge's sentencing was improper. However, we note the trial court is accorded discretion in sentencing and the court may consider the defendant's personality and character. *State v. Patino*, 177 Wis. 2d 348, 384-85, 502 N.W.2d 601 (Ct. App. 1993).



This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)4.

