

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 2, 2006**

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. 2005AP3174-CR**

**Cir. Ct. No. 2004CT421**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GARY D. KLUCZYNSKI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Walworth County:  
MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 ANDERSON, J.<sup>1</sup> Gary D. Kluczynski appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration

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

(PAC), third offense. Kluczynski argues that he was denied a fair trial because of judicial bias. We disagree and affirm.

*Facts*

¶2 Kluczynski's sole argument on appeal concerns the question of judicial bias. We limit our recitation of the facts accordingly.

¶3 The State charged Kluczynski with operating a motor vehicle while under the influence of an intoxicant (OWI) and PAC, both as third offenses. The Honorable Michael S. Gibbs presided over the matter. Kluczynski filed multiple pretrial motions, which Judge Gibbs denied. The case went to trial.

¶4 During deliberations, the jury sent the court two notes. First, the jury wrote: "We have a juror who is holding out his vote for one count unless he gets his way on the other count." Judge Gibbs responded: "Every one of you is entitled to hold firm to your beliefs and opinions; however, threats and attempts to intimidate one another is not acceptable. Your duty is to deliberate and work cooperatively to reach the verdicts. We will stay here as long as necessary to get a verdict." Next, the jury asked for "[a] more clear definition of under the influence, impairment and intoxication." Judge Gibbs told them to "re-read the jury instruction because you can't get it any clearer than that. That instructions are very clear. I'm sorry if there's someone on the jury that doesn't understand them, but they are very clear."

¶5 The jury returned a guilty verdict on the PAC charge. Judge Gibbs, noting that "it appear[ed] as though this jury was heading toward being hung" and that it "really only need[ed] one verdict," entered a judgment of conviction on the

PAC charge and dismissed the OWI charge. Judge Gibbs then commented to the jury:

I want to thank those of you who took part in this in the correct spirit, the desire to work together and figure it out and follow the jury instructions during your service. And the juror who elected that it was more important to be pig-headed and protect his own ego and not read the jury instructions and follow the law, I'm not grateful to you.

In any event, thank you very much for your service. You are free to go.

¶6 Kluczynski filed a motion to stay his sentence. Judge Gibbs denied the motion. In reaching this decision Judge Gibbs remarked, “The Defendant I found at the time I imposed the sentence lied on the stand. I think that goes toward whether I should believe him when he says he’s going to come back and serve his sentence.”

#### *Discussion*

¶7 The right to a fair trial includes the right to be tried by an impartial and unbiased judge. *State v. Walberg*, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982). Whether a judge was a “neutral and detached magistrate” is a question of constitutional fact we review de novo and without deference to the trial court. *State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). There is a presumption that a judge is free of bias and prejudice. *Id.* In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge was biased or prejudiced. *Id.* at 415. With this in mind, we turn to the question of whether Judge Gibbs was a neutral and detached magistrate.

¶8 Whether a judge is biased has both subjective and objective components. *Id.* The subjective component is based on the judge's own determination of whether he or she will be able to act impartially. *Id.* Kluczynski has pointed to nothing that contradicts the reasonable assumption that, by presiding, Judge Gibbs believed that he could act impartially. *See State v. Carprue*, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31. We thus turn to the objective component.

¶9 Under the objective component, we must determine whether there are facts that demonstrate actual or apparent bias. *McBride*, 187 Wis. 2d at 416 (actual); *State v. Gudgeon*, 2006 WI App 143, ¶21, No. 2005AP1528 (apparent). Kluczynski points to several incidents which he claims demonstrate Judge Gibbs' bias against him. We discern no hint of actual or apparent bias in any of these incidents.

¶10 Kluczynski first directs us to Judge Gibbs' comments when he dismissed the jury and claims that they suggest that Judge Gibbs had prejudged the merits of the case. We recognize that jurors should be permitted to exercise their judgment without being subjected to questioning, ridicule or punishment from the court. However, in making those statements Judge Gibbs was expressing frustration with one juror who he was concerned had attempted to threaten or intimidate the other jurors. He reasonably drew this conclusion based on the notes the jurors sent to him, in particular the first one that stated, "We have a juror who is holding out his vote for one count unless he gets his way on the other count." We fail to see how Judge Gibbs' frustration with the juror translates into a prejudgment of the merits of Kluczynski's case.

¶11 Kluczynski next asserts that Judge Gibbs' bias is evidenced by the fact that "nearly 100%" of all of the objections raised by the prosecution during trial "were sustained even though they were not all meritorious." We are unpersuaded.

¶12 First, Kluczynski misrepresents the record. As the State aptly points out, Judge Gibbs overruled several of its objections. Second, in making his point, Kluczynski walks through many of Judge Gibbs' rulings and attempts to show why they were incorrect. However, even if we deemed the rulings incorrect, it does not logically follow that they were motivated by bias. Finally, a scorecard or tally of judicial decisions does not amount to evidence of bias. *Cf. United States v. International Bus. Machs., Corp.*, 618 F.2d 923, 929 (2nd Cir. 1980) ("Judicial independence cannot be subservient to a statistical study of the calls [the trial court] has made during the contest."). A trial judge must be free to make rulings on the merits without the apprehension that if he or she makes a disproportionate number in favor of one litigant, he or she may have created the impression of bias. *Id.* As Justice Frankfurter observed, "A timid judge, like a biased judge, is intrinsically a lawless judge." *Id.* (quoting Justice Frankfurter's concurrence in *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949)). Kluczynski has not shown how Judge Gibbs' rulings, even if one-sided, evidence any inkling of bias.

¶13 Kluczynski lastly suggests that Judge Gibbs exhibited bias by commenting at sentencing and at the hearing on his motion to stay his sentence that he believed Kluczynski had lied at trial. However, the lack of a defendant's veracity at trial is an appropriate factor at sentencing. *See Knecht v. State*, 68 Wis. 2d 697, 699, 229 N.W.2d 649 (1975). Furthermore, in making the comments at the motion hearing, Judge Gibbs was appropriately explaining the grounds for his discretionary denial of Kluczynski's motion—largely, Kluczynski's failure to

offer any issues that could support a basis for the appeal, his concern that he could not believe Kluczynski that he would serve his sentence should he not prevail on appeal and his finding that the motion was “being done strictly for the purpose of delay.” See *State v. Salmon*, 163 Wis. 2d 369, 373-76, 471 N.W.2d 286 (Ct. App. 1991) (per curiam). We, of course, encourage trial courts to offer such explanations for their discretionary determinations. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (“[M]ost importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.”). Judge Gibbs’ comments at sentencing and the motion hearing simply do not demonstrate any bias against Kluczynski.

¶14 In sum, Kluczynski has not overcome the presumption of judicial impartiality by establishing either subjective or objective judicial bias. We therefore reject his claim of partiality and affirm.

*By the Court.*—Judgment affirmed.

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

