COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3047-CR **Cir. Ct. No. 01-CF-216**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELDWIN E. BUELOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Eldwin Buelow appeals from a judgment of conviction on one count of exposing a child to harmful material. The issue relates to juror bias. We affirm.

¶2 Buelow argues that the circuit court erred by denying his motion for a mistrial that was based on subjective juror bias demonstrated during voir dire. *See* ***State v. Faucher***, 227 Wis. 2d 700, 717-18, 596 N.W.2d 770 (1999) (definition of "subjective bias"). Although the State has not disputed his description of the motion, we have some difficulty discerning this ground for the motion in the argument Buelow's trial counsel presented. During voir dire, Buelow's attorney asked a question of the venire panel that appears to have been intended to test their willingness to follow jury instructions on the question of what material may be considered "harmful." Counsel first asked whether jurors believed Playboy magazine is harmful for an eight-year-old girl, and then followed up by asking "do you feel that regardless of what the law is, how you are instructed, that you still feel that a Playboy magazine is harmful for an eight-year-old girl?" Eight jurors responded affirmatively.

¶3 There was then some voir dire of individual jurors, and then a discussion in chambers, during which counsel moved for a mistrial. During that argument, counsel did not move to strike any of the jurors who responded affirmatively. Rather, it appears to us that he sought a mistrial because the jury had been "tainted" by reference to Playboy, which would probably be mentioned at trial, but only in a tangential manner. In other words, it appears counsel was concerned that he may have erroneously planted in the jury's mind the idea that the material exposed to this victim was, in fact, Playboy, although there would be no such testimony at trial, and the title of the material would not be identified at trial. The court denied the motion for a mistrial, read the venire panel the applicable instructions, and asked: "Is there anyone who will not follow the instruction as I have just read it to you?" No jurors responded, and jury selection

continued without objection. Five of the eight who had originally responded affirmatively were on the petit jury.

¶4 On appeal, Buelow argues that he should have been granted a mistrial due to juror bias. The ordinary remedy for juror bias discovered during voir dire is to strike individual jurors for cause, on motion. A mistrial, in the context of voir dire, would have meant starting over again with a new venire panel. Buelow does not explain what law provides for a mistrial on the ground of juror bias, nor why the alleged bias of several jurors would require an entire new venire panel. However, the State does not raise these issues, and argues only that the jurors were not biased. Therefore, we proceed in this appeal on the assumption that a mistrial was actually sought on this ground and could lawfully have been granted.

¶5 The State does not dispute that the responses of some individual jurors to the early individual questions may have been sufficient to show subjective bias. However, the State argues that any such concerns were resolved by the court's later reading of the instruction, followed by the lack of responses to the court's question as to whether any jurors "will not" follow the instruction as given. Buelow responds that the group's silence to this question was inadequate to overcome the earlier individual responses indicating bias, because it was insufficient to demonstrate that their opinions had changed. We disagree. While it might have made a clearer record if those jurors had been addressed individually, Buelow cites no case law that requires such an inquiry. The circumstances at the time of the group question had changed, in that the court had now read the specific and detailed instruction that would apply, which the panel had not yet been given at the time of the earlier, individual questions. It is reasonable to conclude that, after hearing the instruction, jurors would be more

confident that they would be able to apply the instruction without impairment by their own personal views on the subject. Therefore, having heard no responses and no further motion from Buelow, the court could reasonably continue with jury selection at that point.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).