

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 13, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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. 2013AP197-CR**

**Cir. Ct. No. 2011CF349**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JESSE L. HERRMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Jesse Herrmann appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether the circuit court's comments at sentencing support a conclusion that the judge was biased. We conclude they do not. We affirm.

¶2 Based on his guilty pleas, Herrmann was convicted of the following offenses arising out of one incident: one count of homicide by intoxicated use of a vehicle; two counts of injury by intoxicated use of a vehicle; two counts of operating while intoxicated causing injury; and one count of hit-and-run involving death. Herrmann was determined to be a repeat offender as to all counts, and all but the last count were charged with Herrmann already having one or more prior OWI offenses. The circuit court imposed consecutive sentences totaling thirty-one years of initial confinement and forty years of extended supervision, with an additional consecutive probation term.

¶3 Near the start of the sentencing hearing, the circuit court made this statement:

THE COURT: Okay. Mr. Herrmann, there is a matter that I'd like to put on the record again just before we begin. It's not a secret that I lost a sister to a drunk driver in the summer of 1976. I made this known. I don't believe that this will have any impact on my ability to set that aside and sentence you based upon the information presented on your case and not my sister's case, but I want you to understand right off the get-go that that is something that I have very zealously tried to set aside, and I do believe that I am able to do that. If you have any issues or questions that you want to ask relative to that, you're certainly welcome to ask them now.

Herrmann and his attorney stated that they were willing to proceed.

¶4 Herrmann's argument that the sentencing judge was biased is based on the following statements that the circuit court made during its sentencing statement, before pronouncing Herrmann's sentence:

In 1976 five young women got into a vehicle, and only one of them survived. The two gentlemen in the other vehicle were 17, drunk out of their minds, and they did not survive. That was my personal story, and I will tell you that a day does not go by that I do not think of that personal

tragedy, and I wish that I could tell these victims that that pain will one day disappear, but it doesn't. Time makes it less. We redirect ourselves to other things, and a day does go by when we don't think of our loved ones and then we feel guilty at night because that happened, but life does go on, and I am very grateful today that I'm looking at four lovely young ladies and that only one family has to go through the pain that my family and the other three young ladies' families had to endure in 1976.

And so perhaps it is again destiny or a higher power or, Pastor, probably the prayers of many others that bring me to be the judge on this particular case because I probably more than anyone else who would be able to sit on this bench in this county understand the pain that these victims are feeling, but I have had the benefit of all those years since 1976 to understand that I have to make Mr. Herrmann pay, but that nothing I do to him will lessen that pain, and that if I don't do more than just incarcerate Mr. Herrmann, if I don't speak out on behalf of my community today, then this tragedy will continue to happen on our streets, and more families will suffer the way these families suffer today.

¶5 The law provides two tests for determining judicial bias: subjective and objective. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Subjective bias refers to the judge's own determination of his or her bias. *State v. Rochelt*, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). Objective bias occurs in two forms. The first is when there is an appearance of bias, and the second is when there are objective facts showing that the judge in fact treated the defendant unfairly. *Goodson*, 320 Wis. 2d 166, ¶9.

¶6 We begin by considering two arguments made by the State. The State argues that the judge was not subjectively biased, but this discussion seems unnecessary to address because Herrmann does not claim subjective bias. Second, the State appears to imply that Herrmann waived or forfeited this issue by agreeing to proceed after the judge first disclosed her own family incident. However, this argument is not tenable due to the apparent inconsistency between

the judge's initial statement that she would not consider her own history, and the extent to which she then discussed that history at sentencing. We are not prepared to say with confidence that Herrmann would have agreed to proceed to sentencing by this judge if he had known what she would say later.

¶7 We turn now to objective bias. We first address whether there are objective facts showing that the judge treated Herrmann differently. Herrmann argues that his sentence “appears to be disproportionately high” in light of statistics he presented to the circuit court. This argument is not persuasive because the statistical information is too vague and general to demonstrate that a defendant in Herrmann's position would not receive a similar sentence but for a biased judge. The data provide no additional information about the other defendants who received above-average sentences, and therefore no meaningful comparison is possible.

¶8 The other component of objective bias is whether there was an appearance of bias. The test we apply is whether a reasonable person could question the court's impartiality based on the court's statements. *Goodson*, 320 Wis. 2d 166, ¶9. This is a legal question that we review independently. *Id.*, ¶7.

¶9 We acknowledge that this is a close case. However, ultimately we find it difficult to distinguish the judge's comments from those we have seen in many other sentencing transcripts in which a judge expresses an understanding of the plight of victims of a crime. It is not uncommon for circuit court judges to have themselves been victimized by the types of crimes that are before them, or to express understanding of what it might be like to be a victim of those crimes, whether that be a robbery, financial crime, or sexual assault.

¶10 We regard such expressions by judges as evincing an understanding of a crime's severity and its effect on victims. And, ultimately, that is what the judge did in this case. She indicated that she has a very accurate understanding of the plight of the surviving victims and families. Reviewing these comments in the context of the entire sentencing shows that the judge also spent considerable time on the defendant's character and other relevant factors. Viewing the sentencing as a whole, we conclude that a reasonable person would not conclude that the judge was biased.

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

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

