No. **98-0581-CR**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHARON M. HAIGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Sharon M. Haigh appeals from a judgment of conviction and order denying postconviction relief. Haigh was convicted of various counts of child neglect and abuse. The issue on appeal is whether Haigh

was denied effective assistance of trial counsel. Because we conclude that trial counsel was ineffective, we reverse and remand for a new trial.

¶2 Haigh was charged with seven counts of child abuse and neglect.[1] A jury trial was held. During the voir dire, the court asked the jurors if any of them would have a problem serving on the jury. Juror Prucha responded that he knew "the officers pretty good." The court then asked, among other things, whether the fact that he knew someone "would interfere with your ability to be fair and impartial." Prucha responded, "To what they might say, yeah." The following colloquy then took place:

> THE COURT: You might give more weight than you would –
>
> JUROR: As far as how I believe in them and what they, you know.

The court did not inquire further about Prucha's knowledge of the officers or his ability to be fair and impartial. Defense counsel did not ask any questions of juror Prucha, did not ask to have Prucha stricken for cause and did not use a peremptory strike to have Prucha removed from the jury. Prucha sat on the jury which eventually convicted Haigh.

¶3 Haigh was convicted on six counts.[2] The court sentenced her to a total of twelve years' imprisonment, with imposed and stayed consecutive

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[1] Haigh was charged in counts one through six as a person responsible for the welfare of a child, with two counts of intentionally causing bodily harm to her stepdaughter, and with four counts of intentionally contributing to the neglect of her stepson. She was also charged with intentionally causing bodily harm to her stepson by conduct which created a high probability of great bodily harm.

[2] Haigh was convicted of the lesser included offenses of recklessly causing bodily harm by conduct which created a probability of great bodily harm, of intentionally causing bodily harm, and three counts of neglect. She was acquitted of one neglect count. A second neglect count was dismissed at sentencing because of a defect in the charge.

sentences, and a term of probation to run consecutively to the prison term. Haigh then filed a postconviction motion for a new trial or to modify the sentence. The circuit court denied the motion, finding that Haigh's trial counsel had not been ineffective.

¶4 On appeal, Haigh argues, among other things, that she was denied due process and her right to an impartial jury or, in the alternative, that she was denied effective assistance of counsel because juror Prucha and another juror were not removed for cause. Because we have decided that Haigh was deprived of effective assistance of counsel for counsel's failure to strike juror Prucha or to have him stricken from the jury, we will not address Haigh's arguments concerning the other juror.

¶5 In a recent series of decisions, the supreme court set forth the standards to be applied in jury bias cases. *See State v. Faucher*, 227 Wis.2d 700, 596 N.W.2d 770 (1999); *State v. Kiernan*, 227 Wis.2d 736, 596 N.W.2d 760 (1999); *State v. Erickson*, 227 Wis.2d 758, 596 N.W.2d 749 (1999); *State v. Mendoza*, 227 Wis.2d 838, 596 N.W.2d 736 (1999). In *Erickson*, the court discussed the issue in the context of ineffective assistance of counsel. The court stated that in light of the defendant's counsel's failure to object and preserve the issue for appeal, "the proper framework for analyzing his claim is that of ineffective assistance of counsel." *Erickson*, 227 Wis.2d at 777, 596 N.W.2d at 759-60. Since Haigh's counsel did not ask to have juror Prucha stricken for cause and did not object when the court failed to strike juror Prucha for cause, the proper framework for analyzing this case is in the context of ineffective assistance of counsel.

¶6   To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient, the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

¶7   We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

¶8   We conclude that counsel's failure to object to juror Prucha was both deficient and prejudicial. In ***Faucher***, 227 Wis.2d at 706, 596 N.W.2d at 773, the supreme court set out new standards for determining when a juror should be stricken for cause.[3] The court established three new terms to be used when discussing questions of juror bias: statutory bias, subjective bias and objective bias. *See id.* We conclude that juror Prucha evidenced objective bias, as defined in ***Faucher***, and therefore we reverse.

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[3] In ***State v. Faucher***, 227 Wis.2d 700, 596 N.W.2d 770 (1999), the issue was whether the circuit court erred when it refused to strike a juror for cause. In this case, the issue is whether counsel was ineffective for failing to ask to have a juror stricken for cause. The analysis of whether cause existed should be the same.

¶9 The objective bias standard focuses on whether a "reasonable person in the individual prospective juror's position could be impartial." *Id.* at 718, 596 N.W.2d at 778-79. In *Faucher*, the court was presented with a situation very similar to the one here. A prospective juror had expressed his opinion about the credibility of one of the witnesses. The juror stated that he knew her to be "a girl of integrity" and someone who "wouldn't lie." *Id.* at 708, 596 N.W.2d at 774. The court found that these statements were evidence that the juror "had an opinion and was not impartial." *Id.* at 730, 596 N.W.2d at 784. The court concluded that a reasonable judge could only reach the conclusion that the juror was objectively biased. *See id.* at 732, 596 N.W.2d at 785.

¶10 Similarly, in this case juror Prucha expressed his belief that he would give more credibility to the witnesses he knew. He stated that he knew some of the officers "pretty good." He also stated that the fact that he knew the witnesses would interfere with his ability to be fair and impartial.[4] These statements indicate that Prucha was not impartial. We conclude as a matter of law that a reasonable judge could only reach the conclusion that juror Prucha could not set aside his opinion and prior knowledge and decide the case fairly and impartially. He was objectively biased.

¶11 The State argues that this case is similar to *Erickson* in which the supreme court refused to presume prejudice to the defendant when he did not get

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[4] When denying Haigh's motion for postconviction relief, the circuit court stated that it was not clear that Prucha actually knew the officers who were being called as witnesses, or whether he just knew some officers in the town of Sturtevant. The record, however, does not support this finding. The district attorney identified specific officers by name in the list of witnesses he was going to present. It was after this that juror Prucha stated that he knew some of the officers. In the absence of further questioning, the reasonable conclusion is that he knew the officers identified by the district attorney.

the correct number of peremptory challenges. *See **Erickson***, 227 Wis.2d at 771, 596 N.W.2d at 757. In that case, however, Erickson had a fair and impartial jury. The court stated: "There is very little doubt that Erickson was judged by an impartial jury; even he admits as much." ***Id.***

¶12   This is a very different situation. Haigh does assert that she was deprived of her right to a fair and impartial jury. Prucha, an objectively biased juror, actually served on the jury which convicted Haigh. When a biased juror actually serves on a jury, the defendant's right to a fair and impartial jury is violated. *Cf. **State v. Ramos***, 211 Wis.2d 12, 24, 564 N.W.2d 328, 334 (1997). Therefore, Haigh's right to a fair and impartial jury was violated by Prucha's presence on the jury. This situation is distinguishable from the one presented in ***Erickson***.

¶13   Because we conclude that juror Prucha was objectively biased, we must also conclude that trial counsel's performance was deficient because he did not challenge Prucha's presence on the jury. Because allowing a biased juror to serve on a jury violates the defendant's right to a fair and impartial trial, we must conclude that counsel's failure prejudiced Haigh. Haigh was deprived of her right to effective assistance of counsel. Therefore, we reverse and remand for a new trial.[5]

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[5] Haigh raises other issues in her brief on appeal. Because we reverse on the issue of whether counsel was ineffective for failing to strike juror Prucha, we have not addressed the other issues.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.