STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

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Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

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Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

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[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

_____

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2011AP000394-CR
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DEMONE ALEXANDER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE CARL ASHLEY PRESIDING

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STATEMENT OF THE ISSUES

1. Were the defendant's statutory and constitutional right to be present at all proceedings when a jury is being selected violated when after the initial jury selection and during the trial, the trial court voir dired and dismissed two jurors outside of the defendant's presence?

Trial court answer: No.

2. Did trial counsel provide effective representation in asking the defense's main witness whether his testimony was consistent with his statements to the defense investigator, when trial counsel should have known the statements were not consistent, and which resulted in the door being opened allowing the prosecutor access to the defense investigator's notes and work product?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

3. Did trial counsel provide effective representation by providing the state with undiscoverable written notes prepared by the defense investigator which the prosecutor then used to destroy the defense's primary witness?

Trial court answer: Even if defense counsel performed deficiently, the defendant was not prejudiced because the evidence of the defendant's guilt was overwhelming.

4. Did new evidence discovered after the trial warrant a new trial?

Trial court answer: No.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication because Alexander's request for a new trial can be resolved by application of established legal principles.

STATEMENT OF THE CASE

A. Procedural History

On June 24, 2008, a criminal complaint (Doc. 2) was filed in the Milwaukee County Circuit Court charging the defendant with one count of first-degree intentional homicide while armed, as a repeater, and possession of a firearm by a felon, as a repeater.

The charges stemmed from an incident which occurred on June 10, 2007 in the City of Milwaukee. Officers were dispatched to investigate a shooting at 2600 West Victory Lane in the City of Milwaukee. The complaint alleged that at this time and place, there were a number of persons standing in front of a residence located at 2605 West Victory Lane. These persons included Kianna Winston, who resided on the first floor of the residence, and several others, identified as Steven Jones, Candace Winston, Chulanda Jones, and Carrie Arnold. The victim, Kelvin Griffin, resided in the upstairs apartment of the residence. According to the complaint, Kianna was angry with Kelvin Griffin. Kianna and Chulanda began shouting:

"C'mom KG. Bring your ass outside. Come out." About a minute later, Griffin came out with an assault rifle and started pointing it at the people and said: "Everybody move the fuck around."

At this point, some of the witnesses said they heard shots ring out and when they looked in the direction where the shots came from, they saw the Defendant, Demone Alexander, shooting a black pistol from an area located near a dumpster. One witness estimated that Alexander fired the weapon about 13 times. The complaint further alleged that the victim did not fire his assault rifle back at Alexander, but rather ran from the scene. The defendant allegedly continued to follow the victim, shooting at him as he followed him. According to the complaint, Kelvin Griffin subsequently died as a result of the bullets shot by the defendant.

This matter was eventually tried to a jury between October 13 and October 21, 2008. The defendant was convicted of first-degree intentional homicide while armed and felon in possession of a firearm. The defendant was given a sentence of life imprisonment. He

subsequently filed a motion for postconviction relief which the trial court denied without a hearing.

B. Jury Issue

On the fourth day of trial, it came to the court's attention that one of the juror's might have been acquainted with a person in the gallery of the courtroom (84:58). The court conducted a conference in chambers with the attorneys. The defendant was not present. The court asked the defendant's attorney if she would be willing to "waive" the defendant's right to be present. *Id*. The defendant's attorney indicated that she was waiving the defendant's right to be present. *Id*.

The court proceeded to voir dire Juror #10 (Jolanda P.) outside of both the jury's and the defendant's presence. *Id*. Jolanda P. indicated that she recognized someone in the gallery ("Monique") and described her as "an old friend of the family," and that they had grown up together (84:58-59). Jolanda indicated that "she [Monique] went to school with my sister, and she's always around my family. We party together, go out together, stuff like that." (84:59).

Jolanda admitted that Monique was actually her sister's friend and that they were not talking anymore, and since there was apparent hostility between her sister and Monique, that she (Jolanda) did not talk to Monique anymore either. *Id.* When asked whether she knew what relationship Monique had to the case, she replied: "I'm not sure. I'm not even sure." *Id.* Jolanda was then allowed to leave the chambers (84:61).

The court then asked the attorneys what relationship Monique had to the case. The assistant district attorney indicated that the defendant had told the bailiff that Monique was the mother of his (the defendant's) child (84:61–62). Defense counsel argued that Jolanda did not know that the defendant was the father of Monique's baby and therefore it could not be demonstrated that Jolanda would have any biases or prejudices (84:62). The assistant district attorney argued it might be "dangerous" to keep her on the jury. *Id.* The court then indicated that before making a ruling about Juror Jolanda P., the court wanted to know what the defendant knew about the relationship between Jolanda and Monique:

> **Hang on. I'm sorry to interrupt. I think I need a moment here. I need to know what he knows about any kind of relationship. I think he can help fill in the gaps about who this person is and what he knows. Do you understand what I'm saying? Does he know something more? I mean, from his standpoint is it going to affect his belief that things are okay because she's on the jury? And at this point you haven't had a chance to talk to him yet about this woman. So, first of all, let's do this. I'm going to allow you two to go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know. So why don't you do that first**
>
> **Now, I will caution you that they're close to the glass. And so, you know, having them not hear would probably be a good thing. So I'm going to give you a few minutes to do it. We're going to wait right here so we don't have to move back and forth so I can get the record supplemented about what, if any, impact your client has about what we just talked about.**

(84:63-64).

Defense counsel responded by noting that she would object to her client making any statements on the record:

> **MS. WYNN:** **Just so the record is clear, I'm going to object to my client making any statements on the record.**
>
> **THE COURT:** **About what?**
>
> **MS. WYNN:** **About anything at this point.**

THE COURT: wait a minute.

MS. WYNN: But I'll talk to him.

THE COURT: Well, if you want to waive – I don't even know if you can. Well, talk to him first and then tell me what you want to do.

MR. STINGL: I think since we're on the record here, if they talk to him, they can probably gather the information that they want, that the court wants from him without –

THE COURT: Oh, sure.

MS WYNN: Okay. I don't want him making any statements on the record.

(84:64).

The defendant's attorney's then went back and consulted with the defendant. Attorney Wynn advised the court that the defendant had confirmed that Monique was his "baby's momma." ***Id.*** **Defense counsel further clarified that the defendant told her that he had not seen Monique in 16 months, that he was not close to her, that he did not know Juror Jolanda P., that he had never seen her before, that he didn't know the juror's sister, and that he didn't know any of Monique's friends (84:64–65). Attorney Wynn further advised the court that she had advised the defendant about the**

"falling out" between the juror and the sister and Monique. The defendant told defense counsel that he did not want Juror Jolanda stricken from the panel (84:65).

The court indicated that it would not resolve the issue at that time because another matter had come to its attention. The court indicated that a deputy had advised the court that one of the jurors knew Jesse Sawyer, a witness who had just got done testifying for the defense. *Id*. The juror, Corey W., described by the court as "the African-American male whose father is a police officer," was voir dired *in-camera* outside of both the jury's and the defendant's presence (84:65-66).

Corey P. indicated that he knew Sawyer because Sawyer worked on Harley Davidson motorcycles, and Corey wanted Sawyer to do some work on his (Corey's) motorcycle (84:66). Corey indicated that he had known Sawyer for about three years but did not consider him a personal friend. (84:66-67). Corey indicated that he had seen Sawyer at Harley events and that they had talked about Harley motorcycles. Corey further indicated that he stopped by Sawyer's house once, but

he remained on the sidewalk and did not go into his house or into his garage (84:67). Corey indicated that he had seen Sawyer on three occasions during the preceding year but they didn't socialize or spend any time together (84:68). Corey indicated that he simply knew Sawyer as a person he could take his bike to if he needed some work done, but that they did not have each other's telephone numbers and Sawyer did not know where Corey lived. *Id*.

Defense counsel indicated that she objected to having Corey removed for cause or having him designated as an alternate (84:71). The state indicated that it was not asking that Corey be stricken for cause at that point, but reserved the right to make the motion later. The state didn't know what position to take at that point. *Id*. The court made the following ruling:

> **Okay. I'll tell you what I'm going to do. I am not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots. And if we do, I'll likely – if, if the court finds that it's appropriate to strike one for cause as a result of what's been made known, it will be done in the context of not having their name pulled. But at this point I'm going to defer, keep the two we've got. Because the way this**

> **is going, I don't know what will happen next. So I'll keep all my options open at this point. I don't think any of them being allowed to continue on the jury will compromise anything.**

(84:73).

The parties were then allowed to ask follow up questions of both jurors. Juror Jolanda P. indicated that she had simply told another juror that she had recognized somebody and that the court had asked her some questions, and nothing more (84:73-74). Juror Corey W. indicated that he had merely made a comment to other jurors that he recognized Witness Sawyer and nothing more (84:75). The court reaffirmed its ruling that the jurors would be allowed to remain (84:76). Throughout this entire voir dire of both Jolanda P. and Corey W., the defendant was not present.

After dealing with the jury issue, the court asked defense counsel if she wished to make a motion for a directed verdict and further inquired whether defense counsel wished to have the defendant present when arguing the motion. Defense counsel indicated that she would do it there without the defendant. She did, and the court denied the motion (84:76-77).

The court and both parties then discussed jury instructions outside of the defendant's presence (84:77-79). Defense counsel related that Mr. Alexander did not want instructions on any lesser-included offences (84:78-79). The defendant was then finally brought back into the courtroom (84:79) and the trial proceeded (84:80-81). At the end of that day (Friday October 17, 2008), the court indicated that on Monday morning (October 20, 2008), the court intended to start with jury instructions and closing arguments (84:134).

At the beginning of the hearing on Monday morning (October 20, 2008), the court advised the parties that one of the jurors indicated that he/she had been contacted by Juror Jolanda P., and that Jolanda P. had told that other juror that she would not be able to attend court that morning because her (Jolanda P.'s) boyfriend had been in a car accident. Jolanda P. had apparently contacted that juror on the juror's cell phone (85:3). The court also noted this information came to the court's attention earlier that morning and in the meantime, Jolanda P. had arrived at the courthouse and was present. Discussion continued as to

whether Jolanda P. should be stricken for cause. Id. at 4-5. The state renewed its argument that Jolanda P. should be stricken for cause because she was "connected to the defendant's family." (85:5). Defense counsel objected to having Jolanda P. stricken from the jury, pointing out that:

> **She indicated on the record in chambers that she recognized a person who entered the courtroom. She indicated that she did not know what this person's relationship was to this case or any other case that might be going on in court.**
>
> **She stated that she knew this person - I believe she called her Monique - through her sister, that she was mainly her sister's friend, that they had a falling out. Her sister had a falling out with her several months ago and that she had not seen her in several months.**
>
> **I think the most important thing here though is that she's testified that she did not know of any relationship between Monique and Mr. Alexander.**
>
> **So there's no possible way she could communicate that to another juror because she said she didn't know what their relationship was. *She made no indication that she would be anything less than fair and impartial in this case*. So I don't think there's any basis for a strike for cause, and I would object.**

(85:7) (emphasis added).

The court then indicated that Juror Jolanda P. would be voir dired again in chambers. (85:7-10). It is

not clear from the transcripts whether the defendant was present during this voir dire (85:9). The court advised Jolanda P. that as had been discussed earlier, "we need to know that a juror can put side any issues, personal issues, contact issues, and ultimately decide this case fairly for both sides." (85:10). When asked if she could be fair to both sides, she replied: "Oh, I can, I can. I definitely can. That's my whole reason trying to get all the way over here. I didn't think it was fair for everybody else to wait and deliberate." (85:11). When asked again about her relationship with the woman she had recognized in the gallery and whether that would affect her ability to consider the evidence, she replied: "I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision." *Id*.

The district attorney then grilled the juror further about her relationship and contacts with the person ("Monique") in the gallery (85:13–16). Jolanda was asked why she notified the bailiff when she recognized Monique. Jolanda replied that "I felt it was

very important because I didn't know if she was going to retaliate and try to contact me and ask me about some things or not." (85:12). When asked what she meant by "retaliate," Jolanda replied ". . .If she wanted to do revenge, she'll try to get in contact with me and try to talk to me about the case." *Id.* Jolanda denied that she had any contact with Monique over the weekend (85:12-13). When asked whether she thought Monique had a connection to the case, she replied that she did, but denied that would have any bearing on her ability to be fair.[1] (85:13).

Jolanda further stated that when she notified the bailiff that she recognized the person in the gallery, other jurors were present. The district attorney then asked Jolanda to speculate as to whether, during the remainder of the trial, other jurors might look to her for information outside of the evidence presented at trial (85:14). Jolanda was also asked whether she would then give other jurors an opinion "as to that." *Id.*

---

[1] **Jolanda had previously indicated to the court that she was "not sure" what relationship Monique had with the case at bar. See p. 4, supra.**

Jolanda indicated that she was confused by the question. *Id*. The following exchange then took place:

> **ATTORNEY STINGL: Right, now would it be fair to say that another juror could think that you have some information regarding this case or regarding people connected to this case?**
>
> **A JUROR: No, I don't feel that at all.**
>
> **ATTORNEY STINGL: Why do you say that?**
>
> **A JUROR: Because we don't have a relationship between me and another juror. We don't have a relationship like that.**
>
> **ATTORNEY STINGL: But in terms of another juror believing that you would have information regarding this person who came into court.**
>
> **A JUROR: No. Not at all.**

(85:15).

Defense counsel was then given the opportunity to question Jolanda and asked her if she could base her decision in the case solely on the evidence and testimony and physical evidence that was presented in the courtroom. Jolanda replied that she could. *Id*.

Jolanda was then excused and sent back to the jury room. It appears from the transcript, however, that before she got back to the jury room, the court went into the back room and told Jolanda (without either

party present) not to talk to the rest of the jurors about the voir dire proceeding that had just taken place (85:17). The court explained what it had done and then went on to rule that Jolanda would be stricken for cause:

> **THE COURT: We are back on the record. I went out to grab [Jolanda] to advise her not to talk about the things that occurred in chambers right now with the rest of the jurors.**
>
> **I was also advised by our court reporter that she had indirect information regarding this juror, [Jolanda], and a gentleman that she had saw in the courthouse who was asking about homicide trials.**
>
> **And the court reporter indicated that there are a lot of them, but there's one on the sixth floor as well. Subsequent to that, she saw the same person talking to [Jolanda P.]**
>
> **Is that a fair statement?**
>
> **COURT REPORTER: Yes.**
>
> **THE COURT: Okay. Well first of all I don't even want to get into that. I am satisfied on this record despite her statement to the contrary that she could be fair when she told me – us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other. She's off.**

(85:17).

The court then took up the issue concerning Juror Corey W. (85:18). The state requested that Juror Corey

W. also be removed for cause because he knew Jesse Sawyer:

> **I'm asking that he be removed as well. I don't do this lightly, but the reason is that it's – he's a key witness for the defense. Lester Raspberry indicated that that's who they gave the gun to.**
>
> **And not only does [Juror Corey W.] know him. He's been over at the actual scene of where testimony is where the gun was brought. But more importantly as well if he kept that to himself I think it would be a different story, but he communicated that to the other members of the jury that he knew this person.**
>
> **And my problem is that if it becomes that they are going to talk about Jesse Sawyer they are going to talk about this issue with the gun. Where is the gun? They are going to look to him. Then, well, Jesse Sawyer, is he a decent person? Is he not a decent person?**

(85:18–19)

Defense counsel objected to the proposed removal of the juror for cause, noting that the juror had testified that he could be fair and impartial. Further, she pointed out that Corey did not tell the other jurors how it was that he knew Sawyer. The court then struck Corey for cause:

> **Yes. [Juror Corey W.] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.**

> **He has been with him on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.**
>
> **I'm striking him for cause.**

(85:20).

C. Ineffective Assistance of Counsel

David Benson was called as a witness for the defense in this case (see generally 83:17–28), and 84:8–37). Benson recalled the day of the homicide (June 10, 2007) because he was in the vicinity meeting a girl named Sheila (83:19). Benson testified that after he got off the bus, he walked toward an area where he was supposed to meet Sheila "between 26th and 27th and Glendale." (84:11–12). Benson testified that when he got to that location, he heard gunshots (84:14–15). Benson then ducked his head, turned around, and saw the defendant, Demone Alexander, standing in close proximity to him with some children and a dog (84:15–16, 18–19). After hearing the shots, Benson saw the defendant running away from the area with the children. Benson did not see a gun in the defendant's hands.

(84:24–25). Benson also testified that the dog had been barking at him and he told the defendant to "get that killer." (84:22).

Benson testified that some time after this incident, his sister told him about the homicide in the area on June 10, 2007 (84:26). His sister told him that her ex-boyfriend, the defendant, was being charged with "some murder or something," and that they were trying to "pin it" on Demone. Benson told her that he (i.e., Demone) didn't do it because he was there and saw Demone with the children and the dogs (84:26–27). After that, Benson contacted the public defender's office and met with an investigator from that office (84:27). The following exchange then took place:

> **MS. CANADAY: And at that time what did you discuss with the investigator?**
>
> **MR. BENSON: The case that we're talking about now.**
>
> **MS. CANADY: Did you tell the investigator what you have told us today?**
>
> **MR. BENSON: Yes.**

(84:27–28).

At the outset of his cross examination, the prosecutor did ascertain that Benson was interviewed by

the public defender's investigator, and that the investigator was taking notes during the interview (84:29). The prosecutor then asked Benson additional questions about the incident. The defense then called Jesse Sawyer and Scott Gastrow. After this testimony, the defense rested (84:88-89).

After the conclusion of the defense's case in chief, the prosecutor indicated that the state would be calling Robert Kanack (the public defender's investigator who interviewed Benson) as a rebuttal witness (84:89). The defense objected on "multiple levels" (84:90), which may be summarized as follows. First, the defense argued that because their investigator did not prepare a written report of his interview with Benson, it was not discoverable (84:90,97). In the same breath, however, defense counsel indicated that that they had in fact already turned over[2] the investigator's notes to the prosecutor

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[2] Defense counsel explained how the notes were revealed to the prosecutor: "Mr. Kanack tends to write in shorthand, in a form and manner that Mr. Stingl and I don't think anyone else can read. So Mr. Kanack, as a courtesy, went through his notes with Mr. Stingl to say what he recalls Mr. Benson saying at the time of the original meeting. So based on that Mr. Stingl believes there are inconsistencies and

"as a courtesy." *Id*. Second, the defense complained that it was simply inappropriate for the prosecutor to call "part of the defense team to use him as an impeachment witness," and further argued that the state should first seek to recall Benson to cross examine him on any alleged inconsistencies between his statements to Kanack and his trial testimony (84:90-91,93-94,97-98). Defense counsel argued that the statute[3] required that Benson first be questioned about the inconsistencies (84:98). Third, defense counsel expressed concerns about her conflict of interest in the matter due to her presence at the interview between Kanack and Benson:

> **I would also add one other thing, which I mentioned briefly, is that I was present at that meeting. Obviously, that it makes it very difficult, if not impossible, for me to**

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believes that he should be able to call Mr. Kanack as an impeachment witness." *Id*. at 90. When asked whether she disputed the accuracy of Kanack's notes, defense counsel replied: "I can't dispute that. I mean, I didn't take my own personal notes. So if Mr. Kanack's notes assert. Whatever is in his notes is in his notes. I suppose I have to concede that." *Id*. at 101-02.

[3] **Sec. 906.13(2)(a)(1) provides in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."**

> be able to cross examine Mr. Kanack, leaving that responsibility to Ms. Wynn. Granted, we are co-counsel. I still think it places her in a difficult position as well to cross-examine someone who is a member of this team.

(84:98-99). Defense counsel also admitted that during the interview, it was Kanack who took the notes during the interview with Benson (84:94).

The court ultimately ruled as follows. First, the court agreed with defense counsel that under the discovery statute (sec. 971.23, Stats.) and State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), Kanack's notes were not discoverable, i.e., the defense never had to turn over Kanack's notes to the prosecutor in the first place (84:99). However, the court then went on to rule that any statements Benson made to Kanack were admissible under sec. 906.13, Stats. The court, relying on State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)[4], first noted that the

[4] In State v. Hereford, this court explained the distinction between sec. 971.73 (at the time sec. 971.24) and sec. 906.13, Stats.:

"Section971.24 Stats. . . . requires that at trial, before a witness other than the defendant testifies, 'written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury.' Section 906.13(1), Stats., requires that aprior statement made by a witness, 'whether written or not,' must

definition of a "statement" under sec. 906.13 was much broader than the definition of that term in the discovery statute (sec. 971.23, Stats.)(84:100-101). The court then ruled that it would allow the prosecutor to call Kanack as a rebuttal witness under sec. 906.13,

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be disclosed to opposing counsel only upon counsel's request and only after the witness has been examined concerning the statement.

Section 971.24 Stats., is a discovery statute and sec. 906.13, Stats., is an evidentiary statute. They each serve a different purpose. The purpose of disclosure under sec. 906.13(1) is to make sure the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness . . . Section 971.24, on the other hand, serves the purpose of providing opposing counsel with prior statements of a witness in order to test whether the witness's testimony is consistent and accurate (citation omitted).

In addition to serving different purposes, the language relating to "statement" in each statute is different Statements of the witness under sec. 971.24, Stats., must be 'written or phonographically recorded.' This requirement has been interpreted strictly. It does not apply to notes of defense counsel of interviews with witnesses (citation omitted). . . .

Section 906.13(1), Stats., on the other hand, applies to the prior statement of the witness 'whether written or not,' There is no limiting language describing the nonwritten statement in sec. 906.13, as there is in sec. 971.24, Stats. 'Statement' is is defined in sec. 908.01(1), Stats., as 'an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion.'

State v. Hereford, 195 Wis. 2d at 1075-76.

Stats., "in the interest of justice." (84:102). See sec. 906.13(2)(a)(3).[5]

The state then called Kanack as a rebuttal witness (see generally: 84:108–116). Kanack specifically refuted Benson's testimony that he did not see Sheila at the time of the shooting. Kanack testified that Benson told him during the interview (which defense counsel attended) that at the time of the shooting, he saw Sheila and that when the shooting began, Sheila ran into an apartment building (84:110). This directly contradicted Benson's earlier testimony that he did not see Sheila at the time of the shooting. See Benson's testimony: (84:32–33).

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[5] **Although the prosecutor did not cross examine Benson specifically about the alleged inconsistencies between his direct testimony and his statements to Kanack and he did not give Benson the opportunity to explain or deny any of the statements he allegedly made to Kanack (see sec. 906.13(2)(a)(1)), that was not necessary for the statement to come in under sec. 906.13, Stats. Any of the three reasons listed in sec. 906.13(2)(a) will permit admission of the evidence. See State v. Smith, 2002 WI App. 118, ¶¶ 12–13, 254 Wis. 2d 654, 664–65, 648 N.W.2d 15. Further, although it is unclear whether Benson had been "excused from giving further testimony in this action, " (see sec. 906.13(2)(a)(2))(see also Transcript 10/17/2008 at p. 37), defense counsel took the position that Benson was still available. *Id.* at 93, 98. Finally, the court's decision to allow the testimony under sec. 906.13(2)(a)(3) appears to be discretionary, and therefore not subject to meaningful review.**

Kanack also specifically refuted Benson's testimony that he (Benson) specifically recalled that the incident occurred on June 10, 2007. Kanack testified that during the interview, Benson never told him that the incident Benson was describing occurred on June 10, 2007 (84:109–10). This directly contradicted Benson's earlier testimony that he specifically recalled the incident occurring on June 10, 2007. See (83:19), and (84:8–11).

Kanack also specifically refuted Benson's testimony that he did not see who was shooting the gun. Kanack testified that during the interview, Benson told him that he (Benson) observed the shooter. In particular, Benson told him that a white vehicle came down North 26th Street and turned onto Glendale toward North 27th Street and that the vehicle then stopped. An individual then extended his arm up over the car and started firing a weapon. See Kanack's testimony: (84:110–11). Kanack testified Benson gave a very detailed physical description of the shooter (84:112). This directly contradicted Benson's earlier testimony

that he did not see who fired the shots (84:14-16;25-26).

Finally, it is noteworthy that the defense completely refrained from cross-examining Kanack, even though Kanack provided some of the most damning testimony against the defendant's case in the entire trial (84:116, line 5). The defendant asserted in his postconviction motion that this represented a potential conflict of interest for defense counsel (as she might have been a defense witness) and wished to explore the issue further at a postconviction hearing. However, the trial court declined to grant the defendant a hearing so that issue cannot be developed here.

ARGUMENT

I. THE DEFENDANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN THE JURY WAS BEING SELECTED WAS VIOLATED WHEN THE COURT QUESTIONED JURORS JOLANDA P. AND COREY W. OUTSIDE OF THE DEFENDANT'S PRESENCE AND THE ERROR WAS NOT HARMLESS

Sec. 971.04(1)(c), Stats., declares that a defendant in a criminal case has the right to be present "[a]t all proceedings when the jury is being selected." This right to be present may not be waived

by counsel. State v. Harris, 229 Wis. Wd 832, 839, 601 N.W.2d 682 (Ct. App. 1999); State v. Hernandez, 2008 WI App 121, ¶ 14, 756 N.W.2d 477. The right to be present at jury selection is also protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Harris, 229 Wis. 2d at 839. Jury selection, including the voir dire of potential jurors, is "a critical stage of the criminal proceeding." Harris, 229 Wis. 2d at 339. See also State v. Tulley, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

Deprivation of the right of the defendant to be present during jury selection is subject to harmless error analysis. Harris, 229 Wis. 2d at 339–40; Tully, 248 Wis. 2d at 515. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Id.* at 840. The harmless error rule is also applicable to violations of sec. 971.04(1), Stats. *Id.* The rule requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* An error is considered harmless if it does not affect the "substantial rights"

of the party seeking reversal of the judgment. *Id.* "*Thus, whether the evidence presented to the jury is sufficient to support the conviction is not dispositive*." *Id.* at 841 (emphasis added). Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The line between when reversal is warranted and when it is not warranted when a defendant and his or her lawyer are not present for jury selection is "thin." *Id.* In Harris, the Court of Appeals summarized previous Wisconsin decisions applying the harmless error rule where a defendant has been denied a right granted by sec. 971.04(1), Stats. See *Id.* at pp. 841–43. The court noted that where harmless error has been found, the deprivations were "essentially *de minimus*." State v. Burton, 112 Wis. 2d 560, 563–64, 334 N.W.2d 263 (1983)(trial judge chatted with jurors about their progress in deliberations and told them about the arrangements that had been made for their dinner, and that they should not discuss the case outside of the jury room if their deliberations carried over to a second day); Spencer v. State, 85 Wis. 2d 565, 568, 271

N.W.2d 25 (1978)(trial court received the verdict in the absence of the defendant's lawyer and no waiver by the defendant, but polled the jury nevertheless); State v. David J.K., 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994)(trial court held an in-camera voir dire of three jurors in chambers-counsel was present, defendant was not present. Court of Appeals found that because the defendant agreed with his lawyer's decision not to strike the three jurors, and that "any error was harmless because those jurors would have sat on the jury even had the defendant been present in chambers). See Harris, 229 Wis. 2d at pp. 841-43 for discussion of other cases where harmless error was found.

In the instant case, it is absolutely clear that the defendant's constitutional right to be present during jury selection was violated. The defendant was not present when the court conducted extensive voir dires of Jurors Jolanda P. and Corey W. Supra, pp. 1-8. The only remaining issue is whether the error was harmless. The defendant maintains it was not.

The state will likely argue that even if it was error to voir dire the two jurors outside of the

defendant's presence, the error was nevertheless harmless because the two jurors were ultimately stricken for cause. Additionally, the state will argue that the defendant cannot prove that the jury which actually convicted was in fact not fair and not impartial. The defendant maintains: (1) that they shouldn't have been stricken for cause; (2) the voir dire of the jurors here was extensive and not "*de minimus*."; and (3) the defendant isn't required to prove that the jury which convicted him was not fair and impartial, rather, the state is required to prove beyond a reasonable doubt that the error was not harmless.

Whether a prospective juror is biased is left to the sound discretion of the trial court. State v. Guzman, 2001 WI App 54, ¶ 11, 241 Wis. 2d 310, 319, 624 N.W.2d 717 (citing State v. Ferron, 219 Wis. 2d 481, 491–92, 579 N.W.2d 654 (1998). A determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror's bias is manifest. Ferron, 219 Wis. 2d at 496–97. In Wisconsin, a juror who has expressed or formed any

opinion, or is aware of any bias or prejudice in the case must be struck from the panel for cause. Id. at 499. If a juror is not indifferent in the case, the juror must be excused. Even the appearance of bias should be avoided. *Id*. A prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. *Id*. at 498.

The Wisconsin Supreme Court has recognized three distinct types of "bias." : (1) statutory bias –for the reasons listed in sec. 805.08, Stats.; (2) subjective bias–which is determined by looking at the record and determining whether the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have. Discerning whether a juror exhibits this type of bias depends upon the juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those

responses, and this decision is best left to the circuit court whose factual findings on this will be upheld unless clearly erroneous; (3) objective bias– which in some circumstances can be detected "from the facts and circumstances surrounding the . . . juror's answers" notwithstanding a juror's statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge. Weight is given to the circuit court's determination that a juror is or is not objectively biased and an appellate court will reverse its conclusion only if as a matter of law a reasonable court could not have reached such a conclusion. See State v. Kieran, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

In the instant case, only one of these types of biases is implicated: objective bias. Both jurors in question, Jolanda P. and Corey W., were not barred by serving under sec. 805.08, Stats. (statutory bias), and both jurors repeatedly expressed their ability to be fair and impartial (subjective bias).

The court based its decision to strike Jolanda P. for cause based largely, as counsel reads the record, on an isolated comment she made in response to a question as to why she notified the bailiff that she recognized Monique. See supra., p. 1. She made a comment that "Monique" might retaliate against her (supra, p. 11), although this comment made no sense in terms of the question that was asked. In fact, Jolanda P. did not actually know what, if any, relationship Monique had to the case. She did not know that Monique was the mother of the defendant's child. "Manifest" or objective bias simply can not be found on these facts and there is no reason to conclude from that isolated comment that Jolanda P. could not listen to the evidence and decide the case fairly and impartially.

Likewise, Juror Corey P. did not indicate that he was friends with witness Jesse Sawyer. He simply recognized Sawyer from their mutual hobby involving motorcycles. This is insufficient to conclude that Sawyer was objectively (and "manifestly") biased and would be incapable of listening to the evidence and deciding the case fairly and impartially.

Although undersigned counsel does not believe the facts in this case would support either a fair cross section claim (see State v. Horton, 151 Wis. 2d 250, 257–59, 445 N.W.2d 46 (Ct. App. 1989)), or a claim pursuant to Batson v. Kentucky , 476 U.S. 79 (1986) (see State v. Taylor, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656–57, 679 N.W.2d 893), it would appear that Jurors Jolanda P. and Corey W. were the only African-American jurors on the panel.

The defendant presented this argument to the trial court in his postconviction motion. The trial court declined to grant the defendant a new trial on this basis. The court reasoned: (1) the striking of the two jurors did not occur during the jury selection process, but rather, it occurred after the evidence was completed but before deliberations (64:2); (2) that the court had made careful and substantial inquiry before striking the two jurors for cause as required by State v. Lehman, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

The defendant disagrees with the court's conclusion that the striking of the jurors in this case

did not occur during the "jury selection process." Sec. 971.04(1)(b) provides that a defendant shall be present at trial. Sec. 971.04(1)(c) provides that a defendant shall be present "during voir dire of the trial jury." Many of the cases where claims have been made that a defendant's statutory and constitutional right to be present during voir dire involved situations occurring after the initial jury selection was completed: See State v. Anderson, 2006 WI 77, ¶¶ 51-63, 291 Wis. 2d 673, 702-06, 717 N.W.2d 774 (summarizing cases where both constitutional and statutory claims were made involving a circuit court's communication with jurors during jury deliberation, which is obviously after the initial voir dire of jurors).

Additionally, the defendant disputes that the trial court complied with the dictates of State v. Lehman, 108 Wis. 2d 291 (1982). In Lehmann, the Wisconsin Supreme Court stated:

> **When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the**

> **juror. Such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant. . .The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.**

Id. at 300.

More importantly, the state has not proven beyond a reasonable doubt that dismissal of the two jurors did not contribute to the guilty verdict. Anderson, 291 Wis. 2d at ¶¶ 48, 114–15. In its response to the defendant's postconviction motion, the state, citing State v. Cox, 2007 WI App 38, argued that "[u]nder all of the circumstances, any error was harmless." (57:2). The state made no further argument as to why the error was harmless. The trial court, citing Tulley, found there was harmless error in the defendant's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations (64:2, footnote 1).

In Tulley, the court found that the trial court's interview of three prospective jurors during the initial voir dire (in the absence of counsel and the

defendant) was harmless because (1) Tulley was actually present during the entire voir dire of all the prospective jurors who ultimately served on the panel that convicted him; (2) Tulley did not claim that the jurors that did serve were not fair and impartial; and (3) Tulley did not claim that the outcome of the trial was affected by the trial court's *in camera* discussions with the three jurors. Tulley, 248 Wis. 2d at 517–18.

Here, by contrast, the stricken jurors actually did sit and listen during the evidentiary portion of the trial. Unlike Tulley, Alexander does claim that the outcome of the trial may have been affected because, as Mr. Alexander sees it, the striking of the two jurors in question caused the jury as a whole not to reflect a fair cross section of the community. Although the defendant recognizes that the facts here may not support a Batson or fair cross section claim (see supra., pp. 30–31), the defendant likewise can not imagine that in order to establish that his right to be present during proceedings involving voir dire of prospective jurors was violated, he would need to prove that the jury which actually sat on the case was not

fair and impartial. To impose this type of burden of proof on the defendant would extinguish virtually every "right to be present" claim. The defendant cannot accept that the law would impose such a heavy burden of proof upon him. To the contrary, the law places the burden of proof on the state to show that the error was not harmless.

II. DEFENSE COUNSEL PERFORMED DEFICIENTLY WHEN SHE ASKED WITNESS BENSON WHETHER HIS DIRECT TESTIMONY WAS CONSISTENT WITH STATEMENTS HE MADE TO THE DEFENSE INVESTIGATOR BECAUSE THEY WERE NOT CONSISTENT AND THE QUESTION OPENED THE DOOR UNDER SEC. 906.13 STATS FOR THE PROSECUTOR TO USE THOSE STATEMENTS TO IMPEACH BENSON AND DESTROY THE DEFENSE'S PRIMARY WITNESS AND THE DEFENDANT WAS PREJUDICED THEREBY

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. State v. Cooks, 2006 WI App 262 ¶ 32-33, 297 Wis. 2d 633, 649-50, 726 N.W.2d 322 (Ct. App. 2006)(citations omitted). The right to counsel includes the right to effective counsel. *Id*. The standard for determining whether counsel's assistance is effective under the

Wisconsin Constitution is the same as under the Federal Constitution. *Id*. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Id*.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. A defendant must establish that counsel's conduct falls below and objective standard of reasonableness. Id. However, every effort is made to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id*.

To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The issue of

whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. State v. Mayo, 2007 WI 78 ¶ 32, 301 Wis. 2d 642, 661, 734 N.W.2d 115 (2007).

In the instant case, defense counsel asked witness Benson whether the testimony he had just given was consistent with the statements he made to the defense investigator, Robert Kanack.. Supra, p. 17. Defense counsel subsequently conceded during the trial[6] that her question "opened the door" for the prosecutor to obtain the notes and use Kanack as a rebuttal witness to impeach Benson. See State v. Hereford, 195 Wis. 2d at 1074-78. Defense counsel was present herself during the defense interview of Benson and she should have known that his statements to Kanack were in absolute and total contradiction to his testimony at trial. By asking the question, defense counsel opened the door for the prosecutor to obtain Kanack's notes, which the prosecutor then used quite effectively to annihilate

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[6] "However, I will concede that I believe on direct I did ask Mr. Benson whether he recalls speaking with Mr. Kanack. And I will concede that asking the question opens the door for the notes to be discoverable, *but only because I asked him that question*." (84:97) (emphasis added).

defense witness Benson when it called Kanack as a witness in rebuttal. See supra., pp. 22–23. There is a reasonable likelihood that a different result would have occurred if counsel had not asked this question.

In his postconviction motion, the defendant demanded a hearing pursuant to State v. Machner, 92 Wis. 2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979), to determine whether defense counsel had a strategic reason for asking Benson if his direct testimony was consistent with his statements to Kanack (46:17). The trial court denied the request for a Machner hearing, concluding that even if defense counsel performed deficiently, the defendant was not prejudiced because the other evidence of the defendant's guilt presented at trial was overwhelming and proved the defendant's guilt beyond a reasonable doubt, and that there was no reasonable probability that the outcome of the trial would have been different, even if the error had not occurred (64:3–4).

III. DEFENSE COUNSEL PERFORMED DEFICIENTLY BY PROVIDING THE PROSECUTOR WITH A COURTESY COPY OF THE PUBLIC DEFENDER'S INVESTIGATOR'S NOTES BECAUSE THE NOTES WERE NOT LEGALLY DISCOVERABLE AND THE DEFENDANT WAS PREJUDICED THEREBY

BECAUSE IT ALLOWED THE PROSECUTOR TO OBTAIN IMPEACHING EVIDENCE AGAINST THE DEFENDANT WHICH THE PROSECUTOR THEN USED SUCCESSFULLY TO DESTROY THE DEFENDANT'S PRIMARY ALIBI WITNESS DAVID BENSON

The rules concerning a defendant's right to the effective assistance of counsel are recited above and will not be repeated here. See Argument II, above.

Defense counsel successfully argued at trial that the defense investigator's notes were not discoverable under sec. 971.23, Stats. See supra, p. 20. In fact, the trial court agreed with her and specifically found that the defense investigator's notes were not discoverable under sec, 971.23, Stats. See supra., p. 20. Despite this very favorable ruling, defense counsel went ahead and turned the notes over to the prosecutor anyway, allowing the prosecutor to discover that Benson's testimony was inconsistent with his statements to Kanack.

As undersigned counsel understands the sequence of events, the defense called Benson as its first witness on the morning of 10/17/2008 (doc. 84). Benson was questioned about his purported consistent statement to Kanack during the earlier part of the morning (84:27-

28). After Benson's testimony was completed, the defense called two additional witnesses, Jesse Sawyer and Scott Gastrow (84:38-86) before the defense rested (84:86). At this point, it was late in the morning and getting close to the lunch hour. The state then indicated its intention to call Kanack as a rebuttal witness (84:89). Defense counsel expressed her intention to object to the state calling Kanack as a rebuttal witness, noting however (and it is unclear when this occurred), "Attorney Wynn, as a courtesy, called Mr. Kanack to come over to show the notes to Attorney Stingl." (84:90).

Attorney Stingl clarified that on the previous day (October 16, 2008), he asked the defense attorneys if there was anything in writing (concerning Kanack's interview of Benson) and was advised that there was "nothing in writing, no report done." (84:91,96). So, presumably, at some point between October 16 and the morning of October 17, 2008, the defense notified Stingl of the notes and then sent Kanack over to see Stingl to review those notes with him. Thus, prior to the court's ruling (after lunch on October 17) that

Kanack's notes were not discoverable, the defense sent Kanack over to show Stingl the notes. After Stingl reviewed the notes, the court then ruled that the notes were not discoverable and that the defense did not have to show the notes to Stingl. It appeared that defense counsel didn't think the notes were discoverable either, and made that argument after giving Stingl the notes.

The defendant asserts that this is not reasonable trial strategy. In fact, it undermined the defense that someone else besides the defendant shot and killed the victim. There is a reasonable likelihood[7] that a different result would have occurred at trial if Stingl had not gotten a hold of Kanack's notes and used them so effectively in destroying the credibility of Benson.

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[7] In determining whether counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See. *Id*. at 687. In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Consequently, the defendant was prejudiced and he is entitled to a new trial.

The defendant made this argument to the trial court in his postconviction motion. The trial court rejected this argument and denied the defendant's request for a Machner hearing, reasoning that even if trial counsel's performance had been deficient, the evidence of the defendant's guilt was overwhelming and there would have been no reasonable probability of a different result at trial, even if the (alleged) error had not been made (64:3-4).

Admittedly, the trial court may have ordered that these notes be turned over anyway under sec. 906.13, Stats. (and not pursuant to the discovery statute), but that brings us back to the argument raised in the previous section as to whether it was reasonable for defense counsel to ask Benson whether his direct testimony was consistent with his statement to Kanack.

IV. ALTERNATIVELY THIS COURT COULD FIND THAT BENSON WAS NOT EXAMINED CONCERNING HIS PRIOR STATEMENTS TO KANACK AND THUS ANY STATEMENTS HE MADE TO KANACK WERE NOT REQUIRED TO BE DISCLOSED UNDER SEC. 906.13, STATS.

As an alternative to granting the defendant a new trial for the reasons stated in the previous two sections, this court could find that Benson's simple affirmative response to defense counsel's question (see supra., at bottom of page 9) did not amount to Benson being "examined concerning his prior statement." See sec. 906.13(1). Section 906.13 does not require disclosure for reasons listed in sec. 906.13(2)(a) if the witness was not examined concerning his prior statements. See State v. Hereford, 195 Wis. 2d at 1077-79. The defendant asserts that Benson merely testified that he talked about the case with the investigator and that he merely responded affirmatively to defense counsel's question: "Did you tell the investigator what you have told us today." Arguably, this did not amount to the witness being asked about any specific prior statements of fact. It was merely a general acknowledgment by the witness that he had spoke with the investigator about the case. Consequently, the defendant maintains that Kanack's notes were not discoverable under sec. 906.13 and that the state had no right to impeach Benson through Kanack's testimony.

V. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF A RECENTLY DISCOVERED WITNESS WHO WAS DISCOVERED AFTER THE DEFENDANT'S CONVICTION AND WHOSE IDENTITY COULD NOT HAVE BEEN ASCERTAINED PRIOR TO TRIAL AND THE WITNESSES' TESTIMONY IS MATERIAL TO THE ISSUE OF WHETHER THE DEFENDANT COMMITTED THE CRIME IN THIS MATTER AND IT IS NOT MERELY CUMULATIVE

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42 (2008). When moving for a new trial based on the allegation of newly- discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Id. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. Id. A reasonable probability of a different

outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." Id. at 48-49 (citing State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 134, 700 N.W.2d 62).

In this case, the defendant contacted undersigned counsel sometime during the summer of 2010 and advised the undersigned that either he or another inmate had been involved in a class at the correctional facility called Restorative Justice. According to the defendant, the new witness in this case, Bicannon Harris, was also enrolled in this same class. Harris mentioned to either the defendant or the other inmate that he had witnessed a homicide in Milwaukee during early June 2007. The defendant contacted undersigned counsel and advised the undersigned of this new development.

The undersigned retained an investigator (James Yonkie) to obtain an affidavit from Bicannon Harris as to what he witnessed in the early part of June 2007. See Affidavit of Bicannon Harris and investigator's report (51:6-10).

In summary, Harris stated that in early June 2007, he traveled from Green Bay to Milwaukee with a woman named "Coco," who he had met earlier at a strip club in Green Bay. Coco took him to a drug house in Milwaukee so she could purchase some marijuana. The only streets Mr. Harris recalled seeing were "Glendale Avenue and Teutonia Avenue." ***Id.*** **These two streets are in very close proximity to where the homicide occurred. (See: 51:11). Harris said that Coco got out of the car and went to obtain the drugs. While he was waiting for her, he got out of the car to urinate. As he did that, he looked over and saw a brown-skinned, African-American male talking to himself. He said that he would be able to recognize this person if he saw him again because he got a good look at him. He said the male pulled out a black hand gun and took a couple of steps toward an alley where there were about 15-20 people standing and started shooting. He said the male shot the gun 8-9 times. He further described the shooter as being about 5'7" tall and 160 lbs., with a tattoo on his neck. The shooter had short wavy hair wearing black shorts and a black long-sleeved T-shirt. Harris said that**

immediately after the shooting he took off and left the area.

The description that Harris gave of the shooter did not match the Demone Alexander. Mr. Alexander does not have a tattoo on his neck. Additionally, the physical description does not match Mr. Alexander.

In his Supplementary Motion for Postconviction Relief (Doc. 51) the defendant requested that this matter be scheduled for a hearing to further question Mr. Harris. The defendant pointed out to the trial court that Mr. Harris' testimony was not something that could have been discovered prior to trial. This evidence would not have been cumulative of any of the evidence presented at trial. Further, the defendant argued to the trial court that evidence was material to the central issue in the case, i.e., whether Mr. Alexander was the person who shot and killed the victim, or whether somebody else did it.

The trial court declined to grant a hearing because it was "wholly unknown what date and time he was in Milwaukee or at what specific street address." (64:4). The trial court also ruled that even if this

evidence had been presented to the jury there was not a reasonable probability that it would have lead to a different result in the trial. *Id.* The defendant disagrees with the finding that the date and time of Harris' observations were "wholly unknown." Harris placed the incident as occurring in early June 2007, which is a very narrow time period and includes the time at which this offense occurred. Moreover, although Harris did not give a precise street address, the area that he indicated the shooting occurred was in very close proximity to the crime scene in the instant case.

CONCLUSION

For all of the foregoing reasons the defendant requests a new trial. If the court does not grant a new trial on the basis of this motion alone, the defendant requests that this matter be scheduled for a Machner hearing.

Dated this 6th day of July, 2011.

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CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this reply brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a reply brief produced with a monospaced font. The brief is 50 pages and contains 10,583 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION
(State of Wisconsin vs. Demone Alexander)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

_____

Hans P. Koesser, Bar No. 1010219

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