STATE OF WISCONSIN

I N S U P R E M E C O U R T

(Court of Appeals – District I Case No. 2011AP394 CR)
(Milwaukee County Circuit Court Case No. 2008CF003168)

STATE OF WISCONSIN,

Plaintiff–Respondent,

v.

DEMONE ALEXANDER,

Defendant–Appellant–Petitioner.

DEFENDANT–APPELLANT'S BRIEF AND APPENDIX

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AND 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

Hans P. Koesser,
State Bar #1010219
Attorney for Defendant–Appellant

Koesser Law Office, S.C.
Post Office Box 0941
Kenosha, Wisconsin 53141–0941
Telephone & Fax No.: (262) 654–4864

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Constitutional Provisions

STATEMENT OF THE ISSUE

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.

Court of Appeals' 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

On June 24, 2008, a criminal complaint 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'mon 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.

Alexander appealed his case to the Court of Appeals, alleging, *inter alia*, that his constitutional and statutory right to be present during jury selection was violated when the court conducted in-chambers interviews with two jurors in his absence. The Court of Appeals disagreed and affirmed Alexander's judgment of conviction. Alexander petitioned this court for review on this issue, and this court granted the petition in an order dated November 14, 2012.

The Court of Appeals decision accurately recites the relevant facts concerning the in-chambers interviews of the jurors, so those facts will not be repeated here. The Court of Appeals decision is contained in the appendix to this brief.

ARGUMENT

II. THE COURT OF APPEALS DECISION THAT ALEXANDER'S PRESENCE WAS NOT REQUIRED WHEN THE TRIAL COURT QUESTIONED AND DISMISSED TWO SITTING JURORS DURING THE JURY TRIAL AND ITS RULING THAT DEFENSE COUNSEL IN ANY EVENT WAIVED THE DEFENDANT'S RIGHT TO BE PRESENT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE COURT OF APPEALS AND PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

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 839. *See also State v. Tulley*, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 514–15, 635 N.W.2d 807.

The trial court concluded that the striking of the two jurors did not occur during the "jury selection process." (R64:2). The Court of Appeals affirmed, reasoning that Wis. Stat. § 971.04(1)(c) (2009–10) requires only that a defendant be present "before" the trial jury is selected. (See Court of Appeals'

decision, p. 3, Appendix A3). The Court of Appeals apparently grafts the additional word "before" onto the plain language of § 971.04(1)(c).

The Court of Appeals conclusion that § 971.04(1)(c)[1] applies only to initial selection of jurors, and not to the remainder of the trial after the jury has been initially selected, is contrary to the plain language of the statute. The term "trial jury", as used in sec. 971.04(1)(c), plainly refers not only to potential jurors during the initial selection of the jury, but also to jurors that have been selected and are present during the remainder of the trial.

The Court of Appeals decision is in direct conflict with this court's decision in *State v. Anderson*, 2006 WI 77, ¶¶ 35-44, 291 Wis. 2d 673, 695-699, 717 N.W.2d 74, where this court ruled explicitly that a defendant has both a constitutional and statutory right to be personally present in the courtroom at every stage of his trial and when any "substantive step" is taken. Id. at 695-97. *See also*

---

[1] **Sec. 971.04(1)(c) provides: Except as provided in subs. (2) and (3), the defendant shall be present: …(c) During voir dire of the trial jury.**

Williams v. State, **40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968). The trial is generally conceived as running from the commencement of the selection of the jury through the rendering of the verdict and the final discharge of the jury.** ***Anderson***, **291 Wis. 2d at 697. During this period, the defendant has the right to be personally present when anything is done affecting him, i.e., whenever any "substantive step" is taken by the court in his case. Id.**

Surely, examination and dismissal of a juror is a "substantive step", from which it follows that Alexander had a personal right to be present, as opposed to a mere opportunity whose implementation was within the realm of attorney tactical decision-making. Since this right is personal, rather than delegable, at a minimum, an on-the-record colloquy would be required for waiver of this personal constitutional right. Id. at 709 (citing ***State v. Klessig***, **211 Wis. 2d 194, 564 N.W.2d 716 (1997).**

The Court of Appeals decision is plainly inconsistent with numerous decisions interpreting § 971.04(1)(c), Stats. In ***Anderson***, **this court summarized**

a number of cases where both statutory and constitutional claims were made involving a trial court's communications with jurors after the initial selection of the jury.[2]

The trial court relied on this court's decision in *State v. Lehman*, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982), in denying the defendant's request for a new trial. 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; and (2) that the court had made careful and substantial inquiry before

---

[2] ***State v. Bjerkaas*, 163 Wis. 2d 949, 472 N.W.2d 615 (Ct. App. 1991)(the Court of Appeals addressed a constitutional challenge to the circuit court's communications with the jury during deliberations, where neither the defendant, his attorney, nor the district attorney were present); *State v. McMahon*, 186 Wis. 2d 68, 519 N.W.2d 621 (Ct. App. 1994)(the Court of Appeals addressed a circuit court's communication with the jury during deliberations outside the presence of the accused, but in the presence of the district attorney and defense counsel); *State v. Pederson*, 220 Wis. 2d 474, 584 N.W.2d 144 (Ct. App. 1998)(the Court of Appeals considered a challenge to a circuit court's communications with the jury during deliberations based on the accused's right to be present in Wis. Stat. § 971.04. Defense counsel and the prosecutor were present, but the defendant was not); *State v. Roller*, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838 (the Court of Appeals addressed a constitutional challenge to a circuit court's communications with the jury during deliberations without consulting the defendant, his attorney, or the district attorney)**

striking the two jurors for cause as required by *State v. Lehman*, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982). (See trial court's decision in Appendix at A20-24). The Court of Appeals agreed with the trial court:

> **Contrary to Alexander's assertion, the trial court did not dismiss the jurors during the jury selection process. The trial court's decision was made on the day scheduled for closing arguments -- well after jury selection had been completed. At that point in the trial, Alexander's counsel was entitled to make the strategic decision to waive Alexander's presence at the in-chambers meetings with the jurors. See *Wilkens*, 159 Wis. 2d at 622-23.**

Court of Appeals Decision, pp. 10-11, See Appendix at A10-11.

First, it should be noted that *State v. Wilkens*, 159 Wis. 2d 618, 465 N.W.2d 206 (Ct. App. 1990) does not stand for the proposition that counsel, as a tactical/strategic decision, may waive a defendant's personal constitutional right to be present. *Wilkens* discusses delegation to counsel of the decision "whether to have a public or closed preliminary hearing." *Wilkens*, 159 Wis. 2d at 622-23. This case is not pertinent to the issue of personal presence at all.

Second, this approach is flatly contrary to this

court's decision in *Lehman*. In *Lehman*, this 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. (emphasis added).

Not surprisingly, the Court of Appeals makes no mention of the *Lehman* case in its decision.

Deprivation of the defendant's right to be present during jury selection is subject to harmless error analysis. *State v. Harris*, 229 Wis. 2d 832, 839–40, 601 N.W.2d 682 (Ct. App. 1989); *State v. Tully*, 2001 WI App 236, 248 Wis. 2d 505, 515, 635 N.W.2d 807. The harmless error rule recognizes that not all constitutional errors require automatic reversal. *Harris*, 229 Wis. 2d at 840. The harmless error rule is applicable to violations of § 971.04(1), Stats. *Id*. However, the rule

requires the State to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* (citing *State v. Burton*, 112 Wis. 2d 560, 570, 334 N.W.2d 263 (1983)). 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. Nevertheless, the error must be evaluated in the context of the trial as a whole. *Id.*

The Court of Appeals also discussed the harmless error principle and concluded, erroneously, that Alexander's absence during the voir dire and striking of the only two African-American jurors was harmless.[3] In making this finding, the court noted that while the jurors were being interrogated behind Alexander's back, Alexander's counsel consulted with him outside the

---

[3] **Implicit in its discussion of the harmless error principle and how it applied to the facts and circumstances of Alexander's case is a tacit admission by the Court of Appeals that Alexander should have been present during the voir dire of the two jurors.**

presence of the trial court and the State during the interrogations. (See Appendix at A11). Further:

> **Alexander's counsel spoke with him privately about the juror's statements and the trial court's questions, relayed relevant information in chambers that had been obtained from Alexander and consistently argued against removing either juror. Therefore, Alexander was not ignorant about what was occurring and being discussed in chambers. He also does not suggest how his physical presence during the in-chambers interviews and arguments might have altered the trial court's decision.**

Court of Appeals decision, p. 11, See Appendix at A11.

In further support of its finding that Alexander's absence was harmless, the court, citing *State v. David J.K.*, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994), noted that "'[a] defendant's presence is required as a constitutional condition of due process only to the extent that a fair hearing would be thwarted by his absence.'" *Id*. Further, the denial of a defendant's right to be present at a particular stage of trial does not automatically entitle him or her to a new trial where the error is found to be harmless beyond a reasonable doubt. Id. (citing *State v. David J.K.*)(See Court of Appeals decision, p. 4, Appendix A4).

The Court of Appeals coupled its recitation of the harmless error rules with a discussion of the rule that when a defendant accepts counsel in the defense of his case, the decision to assert or waive certain constitutional rights is delegated to that attorney, and that a tactical waiver by counsel, even of some constitutional rights, is binding on the defendant. *Id.* (citing *State v. Wilkens*, 159 Wis. 2d 618, 622–23, 465 N.W.2d 206 (Ct. App. 1990), and *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998)). See Appendix at A4. Moreover: "'[W]hen a defendant accepts counsel, the defendant delegates to counsel the decision whether to assert or waive constitutional rights, . . . as well as the myriad tactical decisions an attorney must make during a trial.'" Id.

However, this general rule that an attorney may make tactical decisions, and even waive some constitutional rights, is trumped by the more specific dictates of *State v. Harris* and *State v. Anderson* (see discussion above, at pp 8–11), as it applies to a defendant's right to be present at all proceedings when a jury is being selected. *See State v. Harris*,

229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). Further, as noted above, the case relied on by the Court of Appeals (*Wilkens*) does not stand for the proposition that a defendant may delegate to his attorney the decision whether the defendant should be present during the selection of jurors. At issue in *Wilkens* was whether a defendant could delegate the decision to his attorney to have an open or closed preliminary hearing. An attorney may clearly not waive a defendant's right to be present in any proceedings involving the jury during a jury trial. *Harris*, 229 Wis. 2d at 839. At a minimum, the trial court would have been required to engage Alexander in a *Klessig*-like colloquy before permitting his absence. *Anderson*, 291 Wis. 2d at 709.

Even assuming, for the sake of argument, that an attorney could waive a defendant's right to be present, there is no evidence that it occurred here. Despite the total lack of support in the record that Alexander's counsel made a strategic decision to have Alexander absent from the voir dire of the two jurors, the Court of Appeals found:

> **Contrary to Alexander's assertion, the trial court did not dismiss the jurors during the jury selection process. The trial court's decision was made on the day scheduled for closing arguments – well after jury selection had been completed. *At that point in the trial. Alexander's counsel was entitled to make the strategic decision to waive Alexander's presence at the in-chambers meeting with the jurors. See Wilkens, 159 Wis. 2d at 622-23. Alexander's counsel was adamant that Alexander not make any statements to the trial court, or in the jurors' presence regarding the jurors on the record*; however, the record indicates that Alexander's counsel consulted with him outside of the presence of the trial court and the state during the interviews.**

Court of Appeals decision pp. 10-11, see Appendix A10-11.

There is no evidence in the record that defense counsel made a deliberate, tactical decision to have Alexander excluded during the examination of the jurors. This was pointed out quite clearly in Alexander's reply brief in the Court of Appeals. See Alexander's reply brief at pp. 1-2. (See Appendix at A28-29). Nevertheless, the Court of Appeals found that defense counsel made a strategic, tactical decision to have Alexander absent.

Likewise, there is no evidence in the record that Alexander "voluntarily absented himself from the

proceedings," as argued by the state in its Court of Appeals Brief. (See State's Court of Appeals Brief at pp. 5-6, contained in the Appendix at A26-27). The defendant pointed this out in his reply brief (at p. 3) in the Court of Appeals. (See A30). Although the Court of Appeals recited the rule that a defendant may voluntarily absent himself from court proceedings, the court did not assert in its decision that Alexander voluntarily absented himself from the interrogation of the two jurors. (See Court of Appeals decision at p. 4, citing the *Koopmans* decision. Appendix A4)

Both the state and the Court of Appeals appear to place the burden of proof on Alexander to show that that the error (not allowing Alexander to be present during the questioning of the jurors) was not harmless. The Court of Appeals observed that Alexander "does not suggest how his physical presence during the in-chambers interviews and arguments might have altered the trial court's decision." Court of Appeals decision at p. 11, See A11). See also State's Court of Appeals Brief, p. 8.

As noted above, however, the burden of proof is on the state to show beyond a reasonable doubt that the error was harmless. *Harris*, 229 Wis. 2d at 840. The state has not made this showing. Both the state and the Court of Appeals appear to take the position that Alexander has not shown how his absence may have changed the result of the trial court's decision. Alexander asserts that the State has not shown beyond a reasonable doubt that his absence was harmless error.

Despite the fact that Alexander does not have the burden of proof to show beyond a reasonable doubt that his absence was prejudicial, he takes this opportunity to present reasons why he was prejudiced.

First, Alexander refers this court to its own proclamations concerning the importance of the defendant's presence during examination of jurors. In *Anderson*, this court cited one of its previous decisions why it is important for the defendant to be present:

> **We do not condone the practice of a judge entering the jury room or communicating with a jury outside the presence of the defendant and of counsel for the defendant both and the state, even when the judge scrupulously takes a court reporter with him or her to the jury**

> **room to record the comments. The judge is a figure of authority and respect during the trial; his or her intrusions into the sanctity of the jury deliberations may affect those deliberations. Even a transcript of the judge's communication cannot reveal a judge's facial expressions or tone of voice. Defense counsel and defendant must be present to have the opportunity to observe the judge's demeanor first hand, to object to statements in the event that the communication may be improper in any way.**

***Anderson*, 291 Wis. 2d at 698-99 (citing *State v. Burton*, 112 Wis. 2d 560, 569, 334 N.W.2d 263 (1983)). Alexander asserts that had he been present, he could have observed and listened to the questioning, made suggestions to his attorney as to what questions to ask the jurors, and what arguments to make to the trial court. Alexander's assistance to his attorney would have been influenced by the tone and demeanor of the trial court's questions to the jurors.**

Moreover, from Alexander's perspective, he finds it particularly suspicious that the two jurors that were stricken in his absence were the only two African-Americans on the jury. Counsel recognizes that this circumstance, in and of itself, does not create a presumption of prejudice. Counsel concedes that the evidence here is insufficient to support a claim under

Batson v. Kentucky , 476 U.S. 79 (1986)[4]. Nevertheless, Alexander felt he was short-changed by not being able to sit in and observe this in-chambers proceeding involving the two jurors, who were initially selected as jurors and sat through the entire evidentiary portion of the trial.

Although not discussed by the Court of Apppeals, the state cited *State v. Tulley*, 2001 WI App 236, ¶¶ 10-11, 248 Wis. 2d 505, 635 N.W.2d 807 in support of its argument that Alexander's absence was harmless. (See State's Court of Appeals' Brief at p. 10) The trial court also relied on *Tulley* in denying Alexander's postconviction motion, reasoning that there was harmless error in Alexander's case for the same reason there was harmless error in Tulley, i.e., the stricken jurors ultimately did not participate in deliberations.

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

---

[4] ***See also State v. Taylor*, 2004 WI App 81, ¶ 18, 272 Wis. 2d 642, 656-57, 679 N.W.2d 893, and *State v. Horton*, 151 Wis. 2d 250, 257-59, 445 N.W.2d 46 (Ct. App. 1989).**

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.

Tulley is distinguishable from Alexander's case and provides no guidance. Here, in contrast to Tulley, 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. Moreover, Alexander asserts that had he been physically present during the voir dire of these two jurors, he could have assisted his attorney in formulating questions for the jurors, and he could have assisted his attorney in formulating additional

arguments to the trial court as to why the jurors should not be stricken.

As to the second factor in *Tulley*, i.e., that Alexander is required to prove that the jury which actually sat on the case was not fair and impartial, imposes an unreasonable burden of proof on Alexander, and is inconsistent with all of the other cases which require the state to prove beyond a reasonable doubt that Alexander's absence did not contribute to the conviction. Placing a burden of proof on the defendant to show that the jury which did decide his case was not fair and impartial 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.

As the courts have noted in applying harmless error analysis, 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 *State v. Harris*, 229 Wis.

2d 832, 839-40, 601 N.W.2d 682 (Ct. App. 1989), 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. The Court of Appeals found harmless error 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.

Alexander asserts that the questioning of the two jurors in his case was not "*de minimus*." Alexander's case did not involve something trivial, like a judge advising the jurors that dinner had been ordered for them, or advising them they might have to return the following day if they could not reach a decision. Alexander's case involved the interrogation and ultimate dismissal of two jurors who had been selected during the initial voir dire, and who had heard all of the evidence. There is at least a reasonable probability that if these jurors had remained on the case, there would have been a different result.

Alexander anticipates the state will argue that even if it was error to voir dire the two jurors outside of Alexander's presence, the error was also

harmless because the two jurors were ultimately stricken for cause.

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.

This Court has recognized three distinct types of "bias.": (1) statutory bias –for the reasons listed in sec. 805.08, Wis. 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. Kiernan*, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999).

Here, the Court of Appeals found that that the trial court implicitly found that the two jurors were subjectively biased. See Appendix, A12. Counsel is not certain that this conclusion is correct. Because both jurors repeatedly indicated that they could be fair and impartial, objective, rather than subjective bias, appears to be the type of bias possibly implicated in this case. Counsel agrees that neither juror was barred due to statutory bias.

Counsel asserts that neither subjective nor objective bias was demonstrated in this case. The trial court based its decision to strike Juror 10 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. She made a comment that "Monique" might

retaliate against her. This comment made no sense in terms of the question that was asked. In fact, Juror 10 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. Neither "manifest" nor subjective/objective bias could be found on these facts, and there is no reason to conclude from her isolated comment that Juror 10 could not listen to the evidence and decide the case fairly and impartially. She indicated that she could be fair and impartial.

Likewise, Juror 33 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 either subjectively or objectively (and "manifestly") biased, and would be incapable of listening to the evidence and deciding the case fairly and impartially.

CONCLUSION

For all of the foregoing reasons, the defendant requests that the decision of the Court of Appeals be

reversed. Alexander further requests that this court enter an order granting him a new trial.

Dated this 9th day of December, 2012.

_____

Hans P. Koesser, Bar Id. #1010219
Attorney for Defendant

Koesser Law Office, S.C.
P.O. Box 941
Kenosha, WI 53141-0941

CERTIFICATIONS

CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a monospaced font. The brief is 29 pages and contains 4,481 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 brief which complies with the requirements of sec. 809.19(12). I further certify that:

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

A copy of this certificate has been served with the paper copies of this 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 Court of Appeals; 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

INDEX TO APPENDIX