STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP001765 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAWN M. HACKEL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Jefferson County Circuit Court, Judge Jacqueline R. Erwin, Presiding, and from an Order Denying Postconviction Motion Entered by Judge David J. Wambach

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

Did commentary during voir dire by a sheriff's deputy who was also a member of the jury panel and by Ms. Hackel's own attorney deprive her of the right to an impartial jury and a fair trial, warranting a new trial due to ineffective assistance of counsel or in the interest of justice?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. Because this case involves a misdemeanor conviction, the appeal will be decided by a single judge pursuant to Wis. Stat. § 752.31(2)(f) and (3).

STATEMENT OF THE CASE AND FACTS

Procedural History

The state charged Dawn M. Hackel with operating while intoxicated and operating with a prohibited alcohol concentration, each as a third offense. (2:1). After several evaluations to determine if Ms. Hackel was competent, the case proceeded to a one-day jury trial. (22-24; 35-37; 42; 48; 50-52; 104). The state presented the testimony of the sheriff's deputy who stopped and arrested Ms. Hackel and the chemist with the State Laboratory of Hygiene who analyzed the blood sample. (103:86-219). Ms. Hackel also testified. (*Id*. at 223-45). The jury found her guilty of both counts. (61; 62).

At sentencing on May 14, 2012, judgment was entered on the count of operating while intoxicated. (66: App. 101-02). Circuit Judge Jacqueline R. Erwin imposed a 65-day jail sentence, which with credit of 49 days, amounted to a time-served sentence. (*Id*.). The court also imposed the minimum $600 fine and ordered Ms. Hackel's operating privileges revoked for 24 months. (*Id*.). Following sentencing, Ms. Hackel filed a timely notice of intent to seek postconviction relief. (69).

Subsequently, appellate counsel filed with the court of appeals a no-merit report pursuant to Wis. Stat. § (Rule) 809.32. On January 23, 2014, the court of appeals issued an order directing counsel to respond to two issues identified by the court, including an issue concerning the impact of voir dire testimony of a prospective jury panel member, who was a sheriff's deputy and who expressed his belief that the state had sufficient evidence to convict. (79:13-15). Although the deputy was removed for cause, the court of appeals noted its concern about the effect of his voir dire testimony on the remainder of the jury pool. (*Id*. at 14-15). On March 12, 2014, the court of appeals issued an order rejecting the no-merit report, dismissing the appeal and extending the time for filing a postconviction motion. (77).

Shortly thereafter, counsel on behalf of Ms. Hackel filed a postconviction motion pursuant to Wis. Stat. § (Rule) 809.30(2)(h) seeking a new trial on the ground that the manner in which voir dire was conducted – particularly the comments from the sheriff's deputy – tainted the jury pool so as to deprive her of the constitutional rights to an impartial jury and a fair trial. (79). The motion alleged a new trial was warranted either due to ineffective assistance of trial counsel or in the interest of justice. (79:9-12).

Following a ***Machner***[1] hearing (105), Circuit Judge David J. Wambach issued an oral ruling and a written order denying Ms. Hackel's motion for a new trial. (81; 106; App. 166-84). Ms. Hackel appeals from the judgment of conviction and order denying postconviction relief. (83).

Summary of Voir Dire

On the morning of trial, voir dire began with the court explaining the charges to the jury, introducing the state's two witnesses and other participants, and instructing on the presumption of innocence and the state's burden of proof. (103:23-33; App. 103-13). In response to questions posed by the court and prosecutor, one member of the panel – Robert P. Whitehouse – was identified as a deputy with the Waukesha County Sheriff's Department. (*Id*. at 33-34, 41; App. 113-14, 121).

Ms. Hackel's attorney, Joanne Keane, attempted to end her voir dire by asking if any of the panel members "now believe that Ms. Hackel must be guilty of something to be in her position?" (*Id*. at 48; App. 128). Initially, there was no response, but then Deputy Whitehouse raised his hand, and the question was restated at his request and he answered, "No." (*Id*. at 49; App. 129). Following that exchange, the voir dire continued for another 17 pages, with most of the questions and responses focused on whether panel members believed Ms. Hackel must be guilty of something by virtue of the fact that the state brought charges against her and was proceeding to trial. (*Id*. at 50-66; App. 130-46).

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[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The voir dire on that topic resulted in four jurors, including Whitehouse, being removed for cause. (*Id*. at 65-67; App. 145-47). But in the course of defense counsel's voir dire, Deputy Whitehouse told the court, counsel and entire venire that based upon his training and experience he believed the state had sufficient evidence to convict Ms. Hackel. (*Id*. at 53-54; App. 133-34). Specifically, the exchange was as follows:

> MS. KEANE: Okay. And Mr. Whitehouse, I'll ask you the same question because you agreed initially although perhaps tepidly.
>
> POTENTIAL JUROR WHITEHOUSE: I think I'm a little impartial given the fact myself have arrested drunk drivers. I know the probable cause you need. I know the procedures you need to follow. I know the evidence that you need to gather and, in fact, I have testified as a deputy on drunk driving cases as well. Okay. So, for the State to bring this on, I believe that there's sufficient evidence and they are confident that the evidence that they have is to prove that she's guilty so –
>
> MS. KEANE: And you say sufficient evidence, sufficient evidence that she is guilty.
>
> POTENTIAL JUROR WHITEHOUSE: Mm-hmm.
>
> MS. KEANE: So because of your – umm – professional training and your occupation, you believe that the State has sufficient evidence to convict her – umm – and so based on those – your understanding of those facts as they stand, do you believe that Ms. Hackel is therefore guilty of what she's alleged to have done?

POTENTIAL JUROR WHITEHOUSE: Yes.

(*Id*.).[2]

Those comments followed an exchange between Attorney Keane and another panel member, Richard Stocke, in which Mr. Stocke opined that the state had "probable cause" so she must have broken some law, to which Attorney Keane responded, "However you're thinking, it is the right way to think it." (*Id*. at 49-50; App. 129-30). Somewhat later in the discussion, Mr. Stocke, who ultimately served on the jury, stated that everyone is innocent until proven guilty and he would have to hear the evidence. (*Id*. at 57-58; App. 137-38). But in the course of her questioning on this topic, Attorney Keane commented that "[t]he State has evidence and they think it is rock solid evidence" and asked "who on the jury panel believes because the State … believes it has rock solid evidence against Ms. Hackel that on some level that's enough?" (*Id*. at 52; App. 132). At that point, the court commented that was not helpful, which was followed by:

> MS. KEANE: Okay. Thank you, your Honor. Let me try again. Who believes that the fact that the State has made the decision to charge and to go all the way to jury trial and spend these resources, right, who believes that that means that Ms. Hackel is in violation of the law?
>
> (Potential juror hands raised.)

(*Id*.). Deputy Whitehouse's comments appear on the next page, followed by further discussion on this same topic.

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[2] In construing the use of the word "impartial" in the first sentence of Mr. Whitehouse's comments, the court of appeals in its order identifying potential issues concluded he must have said or meant "partial" given the remainder of the exchange. (79:14).

Finally, when Mr. Stocke asked if Ms. Hackel was pulled over while driving a motor vehicle, the court reminded the panel of its earlier instruction regarding the state's burden of proof and the presumption of innocence. (*Id*. at 59; App. 139).

Evidence Presented at Trial

The state's first witness at trial was Jefferson County Sheriff's Department Deputy Robert Scheinkoenig who made a traffic stop of Ms. Hackel's car at about 5:30 p.m. on a Saturday in April. (103:87-88, 96-97, 123). He clocked Ms. Hackel's vehicle going 72 miles per hour on a state highway with a posted speed limit of 55. (*Id*. at 89-90). The deputy testified that Ms. Hackel's car went around the right side of another vehicle that was turning left and then swerved over the center line before returning to her lane of travel. (*Id*. at 94-96). Once the deputy activated the squad car's emergency lights, Ms. Hackel pulled over to the side of the road. (*Id*. at 96-97).

Detecting a mild odor of alcohol from the car and that Ms. Hackel's eyes were bloodshot and glassy and her speech slurred, the deputy asked her to perform field sobriety tests. (103:99, 108-09). According to the deputy, Ms. Hackel was unable to complete the Horizontal Gaze Nystagmus test because she had trouble following his directions. (*Id*. at 112-13). Specifically, Ms. Hackel followed the tip of his pen by turning her head rather than just her eyes. (*Id*.). She was also unable to maintain sufficient balance to complete the one-legged stand and did not complete the walk-and-turn test as instructed. (*Id*. at 113-19).

Ms. Hackel testified that she was diagnosed with developmental and cognitive disabilities as a young child and continues to struggle with those disabilities as an adult.

(103:223-25). She was diagnosed with speech, language and learning problems at age three and was in special education classes from kindergarten through twelfth grade. (*Id*. at 224-25). Although she told the officer she did not have problems with balance (*id*. at 233-34), Ms. Hackel testified she suffers from back problems and neck pain for which she had been receiving treatment for several years. (*Id*. at 225-26).

During the field sobriety tests, Ms. Hackel broke down crying because she felt frustrated. (*Id*. at 143-45, 235-36). As she explained at trial, "And I just – I tried so hard to do these tests and I couldn't because I – he had to tell me so many times and that's just how I am." (*Id*. at 235-36).

Ms. Hackel acknowledged that when the deputy first asked for her driver's license, she handed him a credit card. (103: 232).

> I mean, I make mistakes like that every once in a while. You know – that's very common – you know – if you really know who I am – you know – I mean – you know – I repeat myself – you know – I'm lost half the time and – you know – I – like – you know – people try to correct me – you know – about different things – you know – about who I am – you know – but yeah, I handed him the wrong card. I didn't realize it. Yeah. Ha. Ha. Ha.

(*Id*.).

Before and after her arrest, Ms. Hackel told Deputy Scheinkoenig that she had not been drinking. (*Id*. at 108, 153). The deputy testified that in the squad car Ms. Hackel "kept on repeating the same questions over and over." (*Id*. at 153). When questioned by the deputy at the jail, Ms. Hackel said she had two whiskey and cokes before leaving her parents' home earlier that evening. (*Id*. at 132-33). At trial,

Ms. Hackel denied drinking and said she told the deputy she had two drinks because he didn't believe her earlier denials and she thought that was what he wanted to hear. (*Id*. at 239-40). She testified that after having a meal at a friend's house that evening, she had used mouthwash and may have swallowed some. (*Id*. at 237-38, 243).

Before being taken to the jail, Ms. Hackel agreed to a blood test. (*Id*. at 122). The state presented the testimony of Ryan Pieters, a chemist with the State Laboratory of Hygiene. (*Id*. at 163). He tested the blood drawn from Ms. Hackel using a gas chromatograph instrument and concluded it had an ethanol content of 0.134. (*Id*. at 178). On cross-examination, Pieters testified about a number of alterations that were made to the instrument in a period of about six weeks immediately after the instrument was used to test Ms. Hackel's blood. (*Id*. at 205-11). He believed the maintenance performed on that instrument did not call into doubt the accuracy of his test. (*Id*. at 212).

Postconviction Hearing

In her postconviction motion, Ms. Hackel sought a new trial due to ineffective assistance of counsel or in the interest of justice, alleging that comments made during voir dire – particularly by Deputy Whitehouse but also to some extend by trial counsel – compromised her right to an impartial jury and a fair trial. (79). Attorney Keane testified at the postconviction hearing. (105:3-13; App. 155-65).

With respect to Deputy Whitehouse's statement that, based upon his experience with drunk-driving cases, he believed the state had sufficient evidence to prove Ms. Hackel guilty, Attorney Keane testified that she had not considered the impact on the other panel members and had not considered moving to strike the panel. (*Id*. at 8-9; App. 160-

61). She testified, "It didn't occur to me." (*Id*. at 8; App. 160).

Keane also testified about certain comments she made during voir dire, including when she responded to Mr. Stocke's statement that Ms. Hackel "broke some law in the State of Wisconsin or she would not be in this position" with, "However you're thinking, it is the right way to think it." (103:49-50; App. 129-30). Attorney Keane testified her response "verges on embarrassment for me" because it could suggest that she agreed with Mr. Stocke's opinion that Ms. Hackel must had "broke[n] some law …" (105:10; App. 162). She expressed "grave concerns" that the panel may have misinterpreted what is the legally correct way of thinking. (*Id*. at 11; App. 163).

Ms. Keane was also questioned about comments in which she referred to the state's belief that "it has rock solid evidence against Ms. Hackel …." (103:52; 105:11; App. 132, 163). She acknowledged that her comments could be construed by the panel as an endorsement of the view expressed by some panel members that the state must have strong evidence against Ms. Hackel or the case would not be going to trial. (105:11-12; App. 163-64).

In its oral ruling, the circuit court found that, although "Attorney Keane may have been inarticulate at times" (106:5; App. 170), her comments during voir dire and her failure to move to strike the panel did not constitute deficient performance. (106:4-14; App. 169-79). In addition, the court found no prejudice given the strength of the state's evidence at trial. (*Id*. at 14-16; App. 179-81). The court also declined to grant a new trial in the interest of justice, concluding that it could not find the jury was tainted by the comments during voir dire. (*Id*. at 17; App. 182).

ARGUMENT

Commentary During Voir Dire by Deputy Whitehouse and Defense Counsel Deprived Ms. Hackel of Her Right to an Impartial Jury and a Fair Trial, Warranting a New Trial Due to Ineffective Assistance of Counsel or in the Interest of Justice.

Even before the state presented its first witness, the men and women who were gathered as potential jurors for Ms. Hackel's drunk-driving trial heard prejudicial and misleading commentary from Deputy Sheriff Whitehouse and from her own attorney. Deputy Whitehouse, a fellow member of the jury panel, told panel members that he believed the state had sufficient evidence of Ms. Hackel's guilt. He knew this based upon his professional experience arresting drunk drivers, gathering evidence and testifying "as a deputy on drunk driving cases …." (103:53; App. 133). The panel also heard defense counsel declare that the state believes it has rock solid evidence of Ms. Hackel's guilt and appear to endorse another panel member's opinion that Ms. Hackel must have broken some law or she wouldn't be facing trial.

The comments by Deputy Whitehouse and counsel tainted the jury panel and infringed Ms. Hackel's constitutional rights to an impartial jury and a fair trial. This court should grant a new trial either due to ineffective assistance of counsel or in the interest of justice.

A. The comments during voir dire impermissibly vouched for the strength of the state's case, undermining Ms. Hackel's right to an impartial jury and a fair trial.

The right to an impartial jury is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***Hammill v. State***, 89 Wis. 2d 404, 407, 278 N.W.2d 821 (1979). Principles of due process also guarantee a defendant a fair trial by a panel of impartial jurors. ***Id***. An "impartial jury" is one that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, "as distinct from preconceptions or other extraneous sources of decision." ***Oswald v. Bertrand***, 374 F.3d 475 (7th Cir. 2004).

Ms. Hackel's rights to an impartial jury and a fair trial were compromised by comments made during voir dire in the presence of the entire jury panel, particularly by Deputy Whitehouse but also to some extent by defense counsel. The comments suggested to the panel that the state must have "rock solid evidence" and, therefore, Ms. Hackel must be guilty because the state not only decided to bring the charges but to "go all the way to jury trial and spend these resources …." (103:52; App. 132). In addition, Deputy Whitehouse opined that, based upon his experience with drunk-driving cases and his knowledge of "the procedures you need to follow", he was convinced that the state had sufficient evidence to establish her guilt.

The comments vouched for the strength of the state's case and had a prejudicial impact akin to impermissible vouching testimony, except that, unlike vouching testimony introduced as evidence at trial, Deputy Whitehouse's opinion

was not even subject to cross-examination. Nor was there an objection or limiting instruction.

It is well settled that the state may not present "impermissible vouching testimony" from an expert, whether, for example, from a psychiatrist, social worker or police officer, suggesting that another witness is telling the truth. ***State v. Kleser***, 2010 WI 88, ¶98, 328 Wis. 2d 42, 786 N.W.2d 144. In a series of cases, the appellate courts of this state have reversed convictions where such vouching testimony was presented to the jury. In ***State v. Romero***, 147 Wis. 2d 264, 269 & 277, 432 N.W.2d 899 (1988), a police officer testified that in his opinion the complainant was being totally truthful, and similar testimony was elicited from a social worker. In ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), a psychiatrist testified there "was no doubt whatsoever" that the complainant was an incest victim. In ***State v. Krueger***, 2008 WI App 162, ¶16, 314 Wis. 2d 605, 762 N.W.2d 114, a social worker testified the child was not sophisticated enough to maintain consistency during the interview "unless it was something that she had experienced." In each case, the improper vouching testimony required reversal of the conviction and a new trial.

Vouching testimony tends to taint a trial because it invades the province of the fact-finder. ***Kleser***, 328 Wis. 2d 42, ¶104. As this court wrote in ***Haseltine***, 120 Wis. 2d at 96, it "creates too great a possibility that the jury abdicated its fact-finding role" to the expert and did not independently determine the defendant's guilt. Here, Deputy Whitehouse's opinion posed the same problem, except, because it occurred during voir dire, it tainted the entire jury panel.

Deputy Whitehouse's "expert testimony" during voir dire impermissibly vouched for the strength of the state's case, including the credibility of the state's two witnesses. His assertions and defense counsel's follow up made clear that his opinion as to the strength of the state's evidence against Ms. Hackel was based upon his professional training and his occupation and, specifically, his knowledge of "the evidence that you need to gather" in drunk-driving cases. (103:53-54; App. 133-34). It suggested the deputy had inside information about drunk-driving cases, unavailable to lay persons, which made certain Ms. Hackel's guilt. The deputy's opinion testimony not only tainted the jury's overall perspective of the state's evidence heading into trial, it would tend to cause the jury to give greater weight to the state's witnesses, both of whom were government employees tasked with gathering evidence used by the state to prosecute criminals, including drunk drivers.

Significantly, the state's first witness was a sheriff's deputy who, like Deputy Whitehouse, was trained to gather evidence of drunk driving and arrest those who are driving drunk. Deputy Whitehouse told the panel he believed Ms. Hackel was guilty because, as he put it, "I know the procedures you need to follow. I know the evidence that you need to gather …. So for the State to bring this on, I believe there's sufficient evidence …." (103:53-54; App. 133-34). Untested even by cross-examination, Deputy Whitehouse's statements vouched for the strength of the state's case and credibility of its witnesses, thereby tainting the jury panel.

The fact that Deputy Whitehouse's impermissible vouching occurred in voir dire rather than as part of the state's case does not make it any less improper or prejudicial, as shown in ***Mach v. Stewart***, 137 F.3d 630 (9th Cir. 1998). There, the federal court reversed on habeas review a state

conviction for sexual assault of a child because of prejudicial comments made during voir dire by a panel member who was also a social worker. ***Id***. at 633.

In questioning by the court before the entire jury panel, the social worker, who was employed by the state, said she had worked with children for at least three years and had never had a case in which the child's accusation of sexual assault had not been borne out. ***Id***. at 632-33. The trial court struck the social worker for cause and instructed the panel that jurors must make determinations based upon the evidence. ***Id***. at 632. Nevertheless, the federal court of appeals held that the trial court should have granted a mistrial or, at minimum, conducted further voir dire to determine if in fact the panel had been infected by the comments. ***Id***. at 633. The court reversed the conviction, writing, "we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury." ***Id***. (footnote omitted).

Similarly, Ms. Hackel's rights to an impartial jury and a fair trial were violated because Deputy Whitehouse's comments during voir dire tainted the jury panel, including those ultimately selected to serve on the jury. The panel heard irrelevant and prejudicial expert testimony, which was not subject to cross-examination, that Ms. Hackel was guilty. The jury was not told to disregard the deputy's comments. Because there was no objection and, in fact, Deputy Whitehouse's statements were elicited during defense counsel's questioning, the court should reverse Ms. Hackel's conviction due to ineffective assistance of counsel or in the interests of justice.

B. Trial counsel's failure to move to strike the panel following Deputy Whitehouse's comments, as well as some of counsel's own comments during voir dire, constitute ineffective assistance of counsel.

A criminal defendant's right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. The defendant must show that counsel's performance was deficient and prejudicial. ***Id***., *citing* ***Strickland v. Washington***, 466 U.S. 668 (1984). Counsel's conduct is deficient if it falls below an objective standard of reasonableness. ***Thiel***, 264 Wis. 2d 571, ¶19. Prejudice is proven where the lawyer's error deprived the defendant of a fair trial and a reliable outcome. ***State v. White***, 2004 WI App 78, ¶10, 271 Wis. 2d 742, 680 N.W.2d 362. The defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. ***Id***. This is not an outcome determinative standard. ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). Rather, a reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. ***Id***.

Whether counsel was ineffective is a mixed question of law and fact. ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether the attorney's performance was deficient and prejudicial are questions of law reviewed independently. ***Id***.

Defense counsel performed deficiently by: (1) failing to move to strike the panel following Deputy Whitehouse's comments; and (2) making comments that appeared to endorse the view of some panel members that Ms. Hackel must be guilty.

A motion to strike the panel would have been well supported by the body of case law, which includes ***Haseltine***, ***Romero*** and ***Krueger***, reversing convictions due to improper vouching testimony. Citing the line of cases prohibiting vouching testimony, this court in ***Krueger*** held that trial counsel was deficient in failing to object to a social worker's testimony that the child's accusation could not be the product of coaching. ***Krueger***, 314 Wis. 2d 605, ¶¶16-17; *see also* ***Earls v. McCaughtry***, 379 F.3d 489, 494 (7th Cir. 2004)(counsel deficient by failing to object to social worker's testimony that she had not noted anything in the child's interview suggesting she was being untruthful).

As argued above, Deputy Whitehouse's opinion that Ms. Hackel was guilty similarly vouched for the strength of the state's evidence and the credibility of its witnesses. In fact, the social worker's testimony in ***Krueger*** closely aligns with the social worker's comments during voir dire in ***Mach***, which the federal court held tainted the panel. In ***Krueger***, 314 Wis. 2d 605, ¶1, the social worker testified the child could not have consistently recounted the details of the alleged assault "unless it was something that she had experienced." In ***Mach***, 137 F.3d at 632, the social worker shared with the jury panel that she had never, in three years in her position, become aware of a case in which a child lied about being sexually assaulted. Both were improper and warranted a new trial.

Rather than attempting to rectify the matter by moving to strike the panel, counsel's follow up question to Deputy Whitehouse highlighted that his opinion about the strength of the state's evidence was based on his "professional training" as a sheriff's deputy (103:54; App. 134), increasing the risk that jurors would be influenced by his opinion. Moreover, counsel had no strategic reason for not moving to strike the panel. Rather, counsel testified it just "didn't occur" to her. (105:8; App. 160).

Although entitled to some deference, counsel's decisions about how to conduct voir dire are not immune from review. *See*, *e.g.*, ***State v. Traylor***, 170 Wis. 2d 393, 399, 489 N.W.2d 626 (Ct. App. 1992) (counsel deficient, in part, by failing to ask follow-up questions of jurors who admitted bias). Here, counsel's questioning of potential jurors fell below an objective standard of reasonableness. When one of the panel members, Mr. Stocke, said that the state must have probable cause and, therefore, Ms. Hackel "broke some law … or she would not be in this position," counsel appeared to sanction that view by telling Mr. Stocke, "However you're thinking, it is the right way to think it." (103:49-50; App. 129-30). Counsel did not immediately remind Mr. Stocke and the panel of the presumption of innocence but, instead, went on to suggest that the state would not expend resources to take the case to trial unless the state believes "it has rock solid evidence against Ms. Hackel …." (103:52; App. 132).

At the postconviction hearing, Attorney Keane acknowledged her comment about the evidence could suggest that the state's evidence must be rock solid or the case wouldn't go to trial. (105:11-12; App. 163-64). Further, Keane expressed "grave concerns" and even embarrassment about her response to Mr. Stocke, because it might be seen as

an endorsement of the view that Ms. Hackel must be guilty. (*Id*. at 10-11; App. 162-63).

Trial counsel's concern is well placed. Confidence in the reliability of the outcome of Ms. Hackel's trial is undermined by the comments of Deputy Whitehouse and her own attorney during voir dire. Even before the state presented its first witness – a sheriff's deputy – the entire jury panel heard from another sheriff's deputy that Ms. Hackel must be guilty because he knew the strength of evidence required to bring this sort of case to trial. His comments were tantamount to vouching testimony of an expert that is not only impermissible but frequently amounts to reversible error. The prejudice was compounded by comments by counsel that appear to endorse the view that the state's evidence must be strong and Ms. Hackel must be guilty of something.

As in ***Mach***, 137 F.3d at 633, the jury's exposure during voir dire "to an intrinsically prejudicial statement … resulted in the swearing in of a tainted jury, and severely infected the process from the very beginning."

C. The court should order a new trial in the interest of justice because the comments by Deputy Whitehouse and counsel tainted the jury panel, thereby preventing the real controversy from being fully tried.

This court has "broad power of discretionary reversal" under Wis. Stat. § 752.35, which "provides the court of appeals with power to achieve justice in its discretion in the individual case." ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The court may grant a new trial in the interest of justice where the real controversy was not fully tried, regardless of whether there is a substantial likelihood of a different result on retrial. ***State v. Van Loh***, 157 Wis. 2d

91, 102, 458 N.W.2d 556 (Ct. App. 1990). As is the case here, an argument that can be framed under ineffective assistance of counsel may also support a request for a new trial because the real controversy was not fully tried. ***State v. Williams***, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719.

This court owes no deference to the circuit court's decision denying Ms. Hackel's request for a new trial in the interest of justice. ***State v. Clutter***, 230 Wis. 2d 472, 476, 602 N.W.2d 324 (Ct. App. 1999). The court of appeals has independent authority to grant a new trial under § 752.35. "If this court believes either that the real controversy has not been fully tried or that it is probable that justice has miscarried, we may, in the exercise of *our* sound discretion, enter such an order as is necessary to accomplish the ends of justice." ***Id***. (emphasis in original). This court conducts an independent review of the record to determine if the real controversy was not fully tried. ***Williams***, 296 Wis. 2d 834, ¶12.

The appellate courts have recognized that the real controversy may not be fully tried where the jury had before it testimony that should have been excluded. ***Vollmer***, 156 Wis. 2d at 20. In fact, in ***Romero***, the supreme court granted a new trial in the interest of justice due to improper vouching testimony from a police officer and social worker. ***Romero***, 247 Wis. 2d at 276-80. As argued above, Deputy Whitehouse's statements during voir dire were akin to improper testimony from an expert vouching for the strength of the state's evidence and credibility of its witnesses. His testimony tainted the entire jury panel, violating Ms. Hackel's right to an impartial jury. As recognized in ***Mach***, 137 F.3d at 633, the danger is that "all of the 'other evidence'

presented during the case was received by a jury that was biased from the outset."

To make matters worse, counsel's own comments during voir dire appeared to endorse the opinions of some panel members that for the state to expend the resources necessary to take a case to trial, its evidence against Ms. Hackel must be "rock solid." Although no doubt unintentionally, those comments not only vouched for the strength of the state's case but also undermined the presumption of innocence. Testimony from a witness commenting about the strength of the state's evidence would surely not be admissible as part of the state's case, nor is such commentary permissible during voir dire.

Deputy Whitehouse's comments are analogous to testimony found irrelevant and prejudicial in ***State v. Budd***, 2007 WI App 245, ¶¶15-18, 306 Wis. 2d 167, 742 N.W.2d 887, where a Department of Corrections' psychiatrist testified about the screening process for selecting sex offenders for ch. 980 proceedings. She described how the process winnowed out the vast majority of potential candidates. ***Id***. at ¶4. The court of appeals concluded that "all the evidence served to do in this case was to inform the jury that Budd was selected as one of the 4.5% of sex offenders recommended for ch. 980 proceedings." ***Id***. at ¶16. The impermissible testimony necessitated that Budd receive a new trial. ***Id***. at ¶18. Deputy Whitehouse's testimony was likewise irrelevant and prejudicial. It merely served to inform the jury panel that given the sorts of procedures the state must satisfy in a drunk driving case, there could be no doubt but that Ms. Hackel was guilty.

Before the jury was even sworn, it heard a highly prejudicial statement from a sheriff's deputy and misleading comments from counsel, both of which cast serious doubt on jury's ability to presume Ms. Hackel innocent and to hold the state to its burden of proof. Because the panel was tainted, thereby infringing Ms. Hackel's rights to an impartial jury and a fair trial, this court should order a new trial in the interest of justice.

CONCLUSION

For the reasons set forth above, Ms. Hackel respectfully requests that the court reverse the judgment of conviction and the order denying postconviction relief, and remand for a new trial.

Dated this 20th day of October, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,557 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 20th day of October, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of October, 2014.

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