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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON PUBLICATION

Plaintiff-Respondent (hereinafter "State") agrees that this appeal, as a one-judge appeal, does not qualify for publication.

STATEMENT ON ORAL ARGUMENT

The State stands ready to provide oral argument should the Court deem oral argument to be necessary.

STATEMENT OF FACTS

As plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. The relevant facts and history will be presented where necessary in the Argument portion of this brief.

STANDARD OF REVIEW

Whether an attorney's actions constitute ineffective assistance is a mixed question of fact and law, and a trial court's determination regarding facts will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845, 848 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070 (1984) and *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985)). The determination of whether trial counsel's conduct constitutes deficient performance or prejudice is a question of law and is reviewed by this court *de novo*. *Id*.

A reviewing court must defer to the discretion of the trial court in denying a defendant's post-conviction motion for a new trial due to a tainted jury panel. *See State v. Wyss*, 124 Wis. 2d 681, 717-18, 370 N.W.2d 745, 762 (1985) (citation omitted). That decision may only be reversed if the reviewing court finds the trial court abused its discretion or made an error in its interpretation of the law. *Id*. (citations omitted).

The Court of Appeals has discretion to grant a new trial in the interest of justice if it finds that the real controversy in this matter has not been tried. *See* Wis. Stat. § 752.35 and *State v. Williams*, 2006 WI App

212, ¶ 12, 296 Wis.2d 834, 845 (citation omitted). This Court must conduct an independent review of the record to determine if a new trial is warranted in the interest of justice. *Id.*

ARGUMENT

I. THE DEFENDANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE SHE CANNOT SHOW THAT HER TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT SHE WAS PREJUDICED BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE.

To establish ineffective assistance of counsel, the defendant must demonstrate that trial counsel's performance was deficient, and that as a result of trial counsel's deficient performance, the defendant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Deficient performance requires a showing that trial counsel's actions fell below the objective standard of reasonableness. *Id*. at 688, 104 S.Ct. at 2064. The defendant has the burden of showing trial counsel's deficient performance caused her prejudice, and there is a strong presumption that counsel acted reasonably within professional norms. *State v. Brunette*, 220 Wis. 2d 431, 446, 583 N.W.2d 174, 180 (Ct. App. 1998) (citing *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845, 848 (1990)). The reviewing court should defer to the trial court's finding of fact, which should not be overturned unless it is clearly erroneous. *Johnson*, 153 Wis. 2d at 127, 449 N.W.2d at 848 (citation omitted). Whether counsel's performance was deficient or prejudiced the defendant is a question of law

that this court should review *de novo*. *Id*. If the defendant cannot establish prejudice, this court need not determine whether trial counsel's performance was deficient. *Id*. at 128, 449 N.W.2d at 848 (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

A. Trial Counsel's Performance Was Not Deficient For Failing To Strike The Entire Jury Panel Because She Properly Moved To Strike Those Jurors That Showed Bias

The right to an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution as well as the principle of due process. *Hammill v. State*, 89 Wis. 2d 404, 407, 278 N.W.2d 821, 822 (1979). "The *voir dire* is designed to eliminate prospective jurors who hold prejudices by striking such jurors from the panel." *After Hours Welding, Inc. v. Laneil Management Co.*, 108 Wis. 2d 734, 744, 324 N.W.2d 686, 692 (1982). This purpose is explored in *State v. Wyss*, 124 Wis. 2d 681, 370 N.W.2d 745 (1985). In *Wyss*, the Wisconsin Supreme Court considered the ruling in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984), which established a two-part rule for determining whether a juror's failure to respond accurately to questions on *voir dire* entitles a party to a new trial. *Wyss*, 124 Wis. 2d at 721, 370 N.W.2d at 764. The *Wyss* court declined to

apply this rule to the circumstances of the case before it and instead held that the focus must be on whether the juror was biased towards the litigant. *Id*. at 725, 370 N.W.2d at 766. The court reasoned that, "A new trial would be a windfall for a defendant, but it would have no prophylactic or deterrent effect on prospective jurors." *Id*.

In making this determination, the court explained that a juror might answer a question truthfully, but his answer might be objectively incorrect or incomplete. *Id*. at 726-27, 370 N.W.2d at 766-67. Under *McDonough Power Equipment*, the fact that the juror answered truthfully would prevent a party from inquiring further into issues of bias with the prospective juror. *Id*. Finding this rule to be too limited, the *Wyss* court held that a movant can ask questions regarding juror bias whenever the court determines that a juror has given an incorrect or incomplete answer to a material question on *voir dire*. *Id*. at 726, 370 N.W.2d at 766. The court's position on the *McDonough Power Equipment* case made clear that in Wisconsin, *voir dire* is an important tool that should be used by parties and the trial courts to screen out potentially biased jurors.

The defendant can establish deficient performance if she can establish that her attorney failed to strike a prospective juror whose answers

indicated he or she might be incapable of making a fair and impartial determination of the evidence. *See State v. Traylor*, 170 Wis. 2d 393, 399, 489 N.W.2d 626, 628 (1992). In *Traylor*, defense counsel asked prospective jurors if any of them had discussed criminal cases with relatives or friends who are police officers. *Id*. at 397, 489 N.W.2d at 627-28. Prospective juror Schoenecker raised her hand and stated that she had, and because of these discussions, felt she could not be fair and impartial because she considered the defendant guilty "right away." *Id*. at 397-98, 489 N.W.2d at 627-28. The trial court then instructed the jury that they were to follow the law, despite what they personally believed, and presume the defendant was innocent unless the State proved the defendant's guilt beyond a reasonable doubt. *Id*. When asked if she would be able to follow this instruction, Schoenecker answered that she "would try." *Id*. Later, when defense counsel asked if the jurors expected the defendant to testify in his own defense, Schoenecker indicated that if the defendant did not testify, she would feel like he was hiding something. *Id*. at 398, 489 N.W.2d at 628. Defense counsel used a preemptory challenge to strike Schoenecker. *Id*. at 398-99, 489 N.W.2d at 628. On review, the Court of

Appeals found that counsel's failure to strike Schoenecker for cause constituted deficient performance. *Id*.

In making this determination, the Wisconsin Court of Appeals relied on the holding in *State v. Zurfluh*, 134 Wis. 2d 436, 397 N.W.2d 154 (Ct. App. 1986), in which a prospective juror admitted that she "might not be able to be fair." *Traylor*, 170 Wis. 2d at 399, 489 N.W.2d at 628 (discussing *State v. Zurfluh*). Like the facts before the court in *Traylor*, the court in *Zurfluh* instructed the juror on her duties and then asked the juror whether she would have a problem making a fair and impartial decision based on the evidence. *Id*. The prospective juror answered, "I don't know . . . I'm afraid I might." *Id*. In *Zurfluh*, defense counsel did move to strike the juror for cause, but the court denied the motion. *Id*. On review, the court of Appeals held that the trial court exceeded its discretion and reversed the verdict. *Id*.

The *Traylor* court discussed the similarities between the two cases stating:

> In each case, there was a failure to conclusively determine whether the juror would follow the law as instructed by the trial court instead of following his or her concept of justice. Counsel should have asked the appropriate follow-up questions to assess whether the juror would follow the instructions of the court and, if counsel failed to receive a satisfactory answer, should have moved to reject the juror for cause.
> *Id*. at 399-400, 489 N.W.2d at 628.

Unlike the facts of *Traylor* and *Zurfluh*, in this case, counsel asked extensive questions during *voir dire* to determine whether prospective jurors could be fair and impartial. The defendant's attorney [hereinafter "Attorney Keane"] asked whether any of the prospective jurors believed that the defendant was guilty of something. (R.103 at 48). At first, no one responded, and then prospective juror Whitehouse, [hereinafter "Whitehouse"], stated he would raise his hand and asked Attorney Keane to repeat the question. (R.103 at 48-49). Attorney Keane complied and asked, "I'm wondering if there's anything that would cause you to think that because Ms. Hackel is a criminal defendant facing a jury trial that she must be guilty of something to have gotten her to this place." (R.103 at 49). While Whitehouse answered no, prospective juror Stocke [hereinafter "Stocke"] stated:

> POTENTIAL JUROR STOCK: I would say the State could possible -- had probable cause for her being in this position right here, so obviously there was something that she violated against the State to put her in this position right here. So, in response to your question, the State feels she did something wrong, that's why she's here.
> (Transcript at 49).

Attorney Keane, responded, "That's right. And thank you." (R.103 at 49). Then, the following exchange occurred:

> POTENTIAL JUROR STOCKE: So she broke the law in the State of Wisconsin or she would not be in this position, so, maybe that's the wrong - - maybe I'm thinking this a little wrong, but –
> MS. KEANE: However you're thinking, it is the right way to think it.
> POTENTIAL JUROR STOCKE: Okay. Now, if you'd ask the same question again, maybe my thoughts would change. I interpreted your question that the reason why she is here because -- you know -- something -- she broke some law, that's why she's here. The State has caused -- I should say, is cause is the answer, probable cause.
> MS KEANE: Right. And you're absolutely right procedurally and legally in every way --
> POTENTIAL JUROR STOCKE: Right.
> MS. KEANE: -- that the State believes that Ms. Hackel has broken a law.
> POTENTIAL JUROR STOCKE: Right
> MS. KEANE: My question to you is as she faces a jury trial --
> POTENTIAL JUROR STOCKE: Okay.
> MS. KEANE: Right. She is presumed to be innocent. Now, your statements and I appreciate your being forthright about that.
> POTENTIAL JUROR STOCKE: Mm-hmm.
> MS. KEANE: They know what they are doing.
> POTENTIAL JUROR STOCKE: Mm-hmm.
> MS. KEANE: They have evidence and because they have accused her, she must have violated some law.
> POTENTIAL JUROR STOCKE: That's my thought, yes.
> (R.103 at 49-51).

Attorney Keane asked if anyone else agreed with Stocke. (R.103 at 51). Prospective jurors Cropp [hereinafter "Cropp"], Poole, [hereinafter "Poole"], and Whitehouse raised their hands. (R.103 at 51). Attorney Keane asked the jurors who raised their hands, "As you sit here right now at this moment, you believe this Ms. Hackel must be guilty of something, she must have broken a law for the State to bring charges against her; is that correct?" (R.103 at 51). Both Cropp and Poole answered in the affirmative. (R.103 at 51). Attorney Keane asked:

> MS. KEANE: . . . The State has evidence and they think it is rock solid evidence. I want to know - - I guess I'll ask a question this way; who on the jury panel believes because the State has rocks - - believes it has rock solid evidence against Ms. Hackel that on some level that's enough?
> THE COURT: I don't think that, that on some level is helpful.
> 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.
> (R.103 at 52).

After this question, two more prospective jurors, Carson and Dathan, raised their hands. (R.103 at 52-53). Stocke did not, and when he was asked why, Stocke stated, "Well, I haven't heard all the facts of the case, obviously. And as I say, everybody has to be proven guilty." (R.103 at 53). Attorney Keane then asked Whitehouse why he raised his hand to her second question. (R.103 at 53). Whitehouse replied:

> 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 procedure 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.
> (R.103 at 53-54).

Attorney Keane then addressed Carson and Dathan and asked why they raised their hands. (R.103 at 54-56). Both Carson and Dathan indicated that they felt that because the State feels it could win its case, the defendant must be guilty of breaking some law. (R.103 at 54-56). Attorney Keane then clarified her understanding of Dathan's response by asking, "You're saying the State believes it can prove its case against Ms. Hackel." (R.103 at 55). Dathan responded, "Mm-hmm" and agreed that he would need to hear the evidence for himself to decide. (R.103 at 55-56). Attorney Keane then elicited that jurors Whitehouse, Carson, Cropp, Stocke, and Poole believed that defendant must have violated some law for the State to bring charges, although Stocke was less adamant and stated that the State would have to prove its case. (R.103 at 56-60). To Stocke, Attorney Keane directed the following questions:

> MS. KEANE: -- and tell me if I'm correct. That the State believes it has some strong evidence and the reason we are having the trial is to present the evidence to you guys, the fact finder, the jurors in this case and based upon the evidence that you receive as presented at the trial, that you will make your decision at the end of that process; is that correct?
> POTENTIAL JUROR STOCKE: Yes, once I hear all sides, correct.
> MS. KEANE: But right now before we get through any of that, do you believe that Ms. Hackel must have violated some law as she sits before you right now?
> POTENTIAL JUROR STOCKE: Well, then I'll go back to what I said before, the reason why she is here, obviously, she was driving –
> (R.103 at 59-60)

The court then intervened and informed the jurors that they would need to follow the jury instructions. (R.103 at 59). Attorney Keane asked Whitehouse, Cropp, and Poole if they felt they were biased, and all three answered yes. (R.103 at 59-60). None of the other jurors indicated they felt they were biased. (R.103 at 60). Attorney Keane brought challenges for cause for prospective jurors Whitehouse, Carson, Poole, and Cropp. (R.103 at 65). The court granted Attorney Keane's motion and excused all four jurors for cause. (R.103 at 65-68). Attorney Keane asked the prospective jurors that took the place of those who were excused the following:

> MS. KEANE: Thank you, your Honor. I'm wondering if any of the new panel members would have raised their hands or agree with the statement by the fact of her sitting beside me and having been accused of the crimes today that Ms. Hackel must be guilty of having committed a crime.
> (R.103 at 73).

No one responded to this inquiry, and after preemptory challenges, the jury was empaneled. (R.103 at 73-75)

Through her questioning of the prospective jurors, Attorney Keane established that Whitehouse, Carson, Poole, and Cropp all gave answers that indicated they would not be able to make a fair and impartial decision based on the evidence presented at trial. All felt that if the State brought

charges against the defendant and was willing to have a trial on those charges, then the defendant must be guilty of something. At first, Stocke's answers indicated bias, but then Stocke clarified that he would require the State to prove its case. Because the state of mind of the jurors that were dismissed indicated they believed the defendant must be "guilty of something," before requiring the State to prove its case, Attorney Keane appropriately challenged these jurors for cause.

The remaining jurors had no input on the matter, and the trial record does not indicate whether there were concerns from any of the parties. Attorney Keane properly asked questions of prospective jurors that were intended to discern how they felt about the guilt of the defendant, which is one of the most important purposes of *voir dire*. There is no indication from the record that the remaining jurors were "tainted" by the statements of the dismissed jurors, and the defendant has not shown that any "taint" occurred. Attorney Keane properly acted by challenging for cause those jurors whose answers indicated they were not able to make a fair and impartial decision.

B. Because The Defendant Has Not Shown That She Was Prejudiced By Statements Made By Prospective Jurors and Trial Counsel During *Voir Dire,* The Defendant Cannot Establish She Was Denied Effective Assistance of Counsel.

In order to establish that the defendant was prejudiced by Attorney Keane's failure to strike the jury panel and Attorney Keane's own statements during *voir dire*, the defendant must show that Attorney Keane's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838 (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064). This burden cannot be met by showing that an error had some conceivable effect on the outcome. *Id.* (citation omitted). Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

To show prejudice for trial counsel's deficient performance during the selection of a jury, a defendant must show that counsel's performance resulted in a biased juror member hearing her case, and not whether a differently composed jury would have acquitted the defendant. *See Koller*, 2001 WI App at ¶ 14. *See also State v. Traylor*, 170 Wis. 2d 393, 400-01, 489 N.W.2d 626 (Ct. App. 1992) and *State v. Lindell*, 2001 WI 108, ¶81, 245 Wis. 2d 689, 629 N.W.2d 223. When determining whether there were

any biased jurors, mere speculation is insufficient to satisfy the prejudice prong of *Strickland*. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

Whether trial counsel's actions constituted ineffective assistance presents a mixed question of fact and law. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). This court should not reverse the trial court's factual findings regarding counsel's actions unless those findings are clearly erroneous. *Id.* at 634, 369 N.W.2d 711. Whether trial counsel's performance was deficient, and whether that behavior prejudiced the defense, are questions of law this court should review *de novo*. *Id.*

In *Koller*, the defendant claimed that he was denied effective assistance of counsel because his trial attorney failed to sufficiently question several prospective jurors about their personal experiences with sexual assault and sexual assault victims. 2001 WI App at ¶ 11, 248 Wis. 2d at 271. There was no indication from the record that any of the jurors that heard the case were biased. *Id*. However, Koller argued that because trial counsel failed to question jurors in depth regarding whether any had an experience with sexual assault or its victims, this failure "might have resulted in a biased juror escaping detection." *Id*. The Court of Appeals

found that Koller failed to establish prejudice because he failed to show that counsel's failure to question jurors regarding sexual assault resulted in a biased juror deciding his case. *Id*. at ¶¶ 15-16, 248 Wis. 2d at 271. The Court determined that because Koller failed to make that showing, it did not have to consider whether counsel's performance was deficient. *Id*. at ¶ 12, 16, 248 Wis. 2d at 271.

In addition, a reviewing court is deferential to trial counsel's use of strategy when evaluating ineffective assistance of counsel claims. *See State v. Mayo*, 2007 WI 78, ¶ 63, 301 Wis. 2d 642, 734 N.W.2d 115. In *Mayo*, the prosecutor made several inappropriate comments during the trial. *Id*. at ¶¶ 14-17, 301 Wis. 2d at 121. In her closing argument, the prosecutor commented on the defendant's decision to invoke his right to silence. *Id*. at ¶ 15, 301 Wis. 2d at 121. She also expressed her personal opinion regarding the defendant's guilt and the role of defense counsel, which was to "get his client off the hook." *Id*. at ¶¶ 15-17, 301 Wis. 2d at 121. The defendant claimed that his trial counsel was ineffective because counsel did not object to the prosecutor's remarks. *Id*. at ¶ 20, 301 Wis. 2d at 122. The Wisconsin Supreme Court found that while trial counsel may have been deficient for failing to fully investigate the case, counsel was not deficient for failing to

object to the prosecutor's improper remarks. *Id*. at ¶ 63, 301 Wis. 2d at 131. This determination was based, in part, on the circuit court's finding that counsel's failure to object involved defense strategy, and the court refused to "second guess" this decision. *Id*. (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

Like the defendant in *Koller*, the defendant in this case failed to make the required showing that trial counsel's failure to strike the jury panel resulted in a biased juror deciding her case. Unlike Koller's trial counsel, however, Attorney Keane questioned prospective jurors extensively regarding potential bias, and as a result of those questions, succeeded in having four jurors struck for cause. *See supra* Section A. The only evidence the defendant produced at the *Machner* hearing was Attorney Keane's testimony. (*See* R.105 at 3-14) In response to appellate counsel's question of whether she thought about striking the jury panel, Attorney Keane stated, "It didn't occur to me." (R.105 at 8) Attorney Keane was asked if she had concerns about the impact Whitehouse's statements might have had on the jury, and Attorney Keane responded that at the time, she was more focused on the jurors who expressed opinions about her question and had not

thought about the impact Whitehouse's statements had on the other jurors. (R.105 at 8-9)

Regarding the statements Attorney Keane made during *voir dire*, at the *Machner* hearing, Attorney Keane was questioned about her statement to prospective juror Stocke, "However you are thinking, it is the right way to think." (R.105 at 9-10) Attorney Keane responded, "In fact, my response, taken out of context, verges on embarrassment for me because it - - it could be argued to suggest that I agree with the potential juror." (R.105 at 10) Attorney Keane was asked if she had concerns about whether the panel misinterpreted her statement to mean that Stocke's opinion was legally correct. (R.105 at 11) Attorney Keane responded, "I do. I have grave concerns about that and I have reflected upon that professionally, as I go forward, so as to not lose sight of my words. . . " (R.105 at 11) Counsel then asked Attorney Keane whether her question, "Who on the jury panel believes because the State has rock - - believes it has rock solid evidence against Ms. Hackel that on some level that's enough?" led the jury to believe that the State would not have taken the case to trial unless it had rock solid evidence. (R.105 at 11) Attorney Keane responded that she

believed there was potential the jury might interpret her misstatement that way but could not speak for the thoughts of the jurors. (R.105 at 11-12)

Aside from Attorney Keane's testimony, which amounts to mere speculation regarding the jurors' state of mind, there was no other evidence introduced at the *Machner* hearing that showed that any of the jurors were biased or that the defendant was deprived of a fair and impartial jury. This is not enough to show prejudice under *Strickland*. The trial record establishes that, aside from the jurors that were struck for cause, no other juror expressed an opinion regarding the defendant's guilt prior to the start of the case. Furthermore, like the strategic decision in *Mayo* when trial counsel did not object to the prosecutor's improper remarks, Attorney Keane's questioning of prospective jurors was intended to locate biased jurors, and she was successful at doing so. Because the defendant has not established that prospective jurors' and/or Attorney Keane's statements caused the defendant to be deprived of a trial by a fair and impartial jury, the defendant cannot establish she was prejudiced. Therefore, the defendant has failed to meet her burden for showing she was deprived of the effective assistance of counsel.

II. THE DEFENDANT HAS NOT SHOWN THAT A MANIFEST INJUSTICE OCCURRED DURING *VOIR DIRE* THAT DEPRIVED THE DEFENDANT OF THE RIGHT TO HAVE HER CASE HEARD BY A FAIR AND IMPARTIAL JURY.

A criminal defendant is guaranteed the right to a trial by an impartial jury by Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution, as well as principles of due process. *See Hammill v. State,* 89 Wis.2d 404, 407, 278 N.W.2d 821 (1979). Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990) (citing *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43 (1961); *McGeever v. State,* 239 Wis. 87, 96, 300 N.W. 485 (1941). Whether a juror is biased and should be dismissed for cause is a discretionary matter to be determined by the trial court. *Louis*, 156 Wis. 2d at 478 (citations omitted). This is because the trial court is "intimately familiar with the *voir dire* proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind which is relevant as well to the determination of objective bias." *State v. Faucher*, 227 Wis. 2d 700, 720, 596 N.W.2d 770 (1999)(citing *State v. Delgado*, 223 Wis. 2d 270, 285, 588 N.W.2d 1 (1999). A trial court's determination of

impartiality should not be set aside by the reviewing court unless the error is manifest. *Louis*, 156 Wis. 2d at 478-79.

A. The Ninth Circuit Case, *Mach v. Stewart,* Should Not Be Considered As Persuasive Authority Because Seventh Circuit Case Law Refutes The Defendant's Argument.

In support of her claim that her due process rights were violated, the defendant cites the Ninth Circuit case *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) and argues that her conviction should be reversed because it was the result of a tainted jury. While similar to the facts of this case, this Court is not bound to follow Ninth Circuit case law. *See State v. Muckerheide*, 2007 WI 5, ¶¶ 37-38, 298 Wis. 2d 553, 571, 725 N.W.2d 930, 939 (stating that while cases from other jurisdictions may be used for persuasive authority, these cases are not binding on Wisconsin courts).

The Seventh Circuit has considered the issue of whether a prospective juror's statements during *voir dire* prejudiced the entire jury panel. In *U.S. v. Hernandez*, 84 F.3d 931 (7th Cir. 1996), the defendant claimed that the district court erred in failing to strike the entire jury panel after several jurors expressed their concerns and frustrations about the criminal justice system. 84 F.3d at 936. Fifteen prospective jurors spoke about their experiences with crime victims and none were satisfied with how the cases

were resolved. *Id.* The Court affirmed the defendant's conviction and determined that because there was nothing but speculation to support the defendant's claim that the remaining jurors lied about their ability to be impartial, the district court did not abuse its discretion in denying the defendant's motion to strike the jury panel. *Id.* (citing *United States v. Moutry*, 46 F.3d 598, 603 (7th Cir. 1995).

Similarly, the defendant has provided no support, aside from speculation, for her claim that the jury panel was tainted by both Whitehouse and Attorney Keane's statements.

In addition, the defendant in *Mach v. Stewart* only claimed that his Sixth Amendment rights to due process were violated. *See generally* 137 F.3d 630. The defendant argues that *Mach v. Stewart* requires this court to find that she was denied due process **and** effective assistance of counsel. *See* Brief and Appendix of Defendant-Appellant, pp. 13-14. Because the Ninth Circuit did not consider the issue of ineffective assistance of counsel in reaching the decision in *Mach v. Stewart*, the State does not believe the case should be relied upon for this issue.

Furthermore, the defendant does not consider the negative impact that relying on *Mach v. Stewart* might have on future *voir dire* proceedings

in Wisconsin. The State fears that attorneys might be dissuaded from asking jurors questions during *voir dire* that might reveal bias, especially if the juror has a professional background relevant to the case. Out of fear that the prospective juror might make statements that, pursuant to *Mach v. Stewart*, the court would consider "expert testimony that taints the jury," an attorney might decline to ask the very questions he or she should be asking to determine juror bias during *voir dire*. In the alternative, more attorneys might begin to request individual *voir dire* of jurors, which is one way of avoiding a "tainted" jury panel as argued by the defendant.[1] For these reasons, the State requests that this court not rely on *Mach v. Stewart* in reaching its decision.

B. The Defendant's Due Process Rights Were Not Violated Because The *Voir Dire* Proceedings Worked Properly To Screen Out Prospective Jurors That Were Biased.

The issue of bias was explored in *State v. Faucher*, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999), where the Wisconsin Supreme Court determined that there were three kinds of juror bias: statutory, subjective, and objective. Statutory bias is defined in Wis. Stat. § 805.08(1) as a juror

[1] This argument was made by the defendant in *U.S. v. Jones*, 696 F.2d 479, 491-93 (7th Cir. 1982), in which a defendant argued that the entire jury panel should have been struck after hearing prejudicial remarks of prospective jurors, and that the court should have conducted personal *voir dire* of the jurors. The Seventh Circuit rejected this argument and affirmed the verdict.

that is "related by blood or marriage to any party or to any attorney appearing in [the] case" and to those who "[have] any financial interest in the case." *Faucher*, 227 Wis. 2d at 717. Subjective bias is present when a juror has "expressed or formed any opinion or [is] aware of any bias or prejudice in the case . . . " and is determined through the words and demeanor of the prospective juror. *Id*. at 717-18. The focus for subjective bias is the juror's state of mind. *Id*.

The final category of bias is objective bias. *Id*. at 718-721. For objective bias, the focus is on whether a reasonable person in the juror's position can be impartial. *Id*. at 718. A reviewing court determines whether a juror was objectively biased by considering the facts and circumstances surrounding *voir dire* and the facts of the case. *Id*. at 719. As stated in *Faucher*:

> When determining whether a defendant should receive a new trial because extraneous prejudicial information reached one or more jurors prior to the verdict, we have phrased the objective inquiry as whether 'there is a reasonable probability that the information in [the juror's] possession would have a prejudicial effect upon a hypothetical average juror.'
> *Id*. at 719 (citing *State v. Messelt*, 185 Wis. 2d 254, 282, 518 N.W.2d 232 (1994).

The defendant does not claim that any juror had an interest in this matter, which would indicate statutory bias. Nor does the defendant claim

that any juror, aside from the ones that were dismissed, expressed any opinions regarding the defendant or the case, which would indicate subjective bias. Instead, the defendant claims the jurors became biased because they heard statements from other prospective jurors who were biased. The category of bias most applicable to this circumstance is objective bias, and therefore, pursuant to *Faucher*, the reviewing court must consider the facts and circumstances surrounding *voir dire* and the case, and whether an average juror would be able to remain impartial in light of the prejudicial statements. *Id.* at 718-19.

For example, in *U.S. v. Jones*, 696 F.2d 479, 491-93 (1982), the defendants claimed that statements made by jurors during *voir dire* violated their confrontation rights and their right to an impartial jury because the judge did not dismiss the entire jury panel after he heard the juror's remarks. The judge asked one juror, "If you were selected as juror . . . could [you] arrive at your verdict based solely on the facts as you find them . . .?" *Id*. at 491. The juror said no and then began to expound stating, "I am not saying that I exactly believe what the newspaper reporter put in the paper, but what's involved here I am definitely against and I . . ." *Id*. At that point, the judge interrupted and stopped the juror. *Id*. A short while later, another

juror was questioned regarding how he felt about the defendant's right not to testify and responded, "I agree. They shouldn't be made to testify against themselves, but I feel, if they have nothing to hide, that – so in that case it may sway me." *Id*.

In determining that the defendants were tried by an impartial jury, the Seventh Circuit Court of Appeals noted that while the judge conducted the bulk of the examination, both sides had the opportunity to ask additional questions of the prospective jurors, which adequately protected the defendants' rights. *Id*. at 492. The court also noted that the trial judge also questioned the jurors regarding sensitive areas of the trial including that drugs were involved and that the defendants may not testify. *Id*. The court noted that, with the exception of two of the prospective jurors, who were dismissed, none of the other jurors displayed prejudice, and neither defendant asked for the dismissal of any juror except for the ones that were dismissed. *Id*. Based on these factors, the court determined that the defendants were tried by an impartial jury. *Id*.

Similarly, the court in this case began the *voir dire* examination of the prospective jurors by asking the jurors questions that would reveal statutory bias. (R.103 at 33-34) Then, like the court in *Jones*, the court

asked jurors questions regarding sensitive issues particular to the case, specifically: if anyone they knew had been accused of operating while intoxicated or if they or anyone they knew was in an alcohol-related car accident. (R.103 at 34) As a result of these questions, two jurors were dismissed due to subjective bias. (R.103 at 35-40) The court then allowed the attorneys for the parties to ask jurors questions. (R.103 at 40-73) Attorney Keane spent a great deal of time trying to ferret out any bias the prospective jurors had. (R.103 at 48-65) The jurors whose answers indicated bias were struck; the ones who showed no indication of bias remained. (R.103 at 65-68) Like the *voir dire* proceedings in *Jones,* the facts and circumstances surrounding the *voir dire* proceedings in this case worked properly to eliminate biased prospective jurors. Based on these facts and circumstances, the State does not believe the defendant can meet her burden in showing that a manifest injustice occurred or that the court abused its discretion.

III. THE DEFENDANT'S REQUEST FOR DISCRETIONARY REVERSAL UNDER WIS. STAT. § 752.35 SHOULD BE DENIED BECAUSE THE CONTROVERSY IN THIS MATTER WAS FULLY TRIED.

The defendant claims that reversal is warranted under Wis. Stat. § 752.35 because Deputy Whitehouse's comments tainted the jury panel to the point where the real controversy was not fully tried and because Attorney Keane unintentionally vouched for the State's case. Brief and Appendix of Defendant-Appellant, pp. 18-21. Wis. Stat. § 752.35 does not require this court to find that a new trial would result in a different outcome. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis.2d 834, 723 N.W.2d 719. However, in *Williams*, the court stated, "Our discretionary reversal power under Wis. Stat. § 752.35 is formidable and should be exercised sparingly and with great caution." *Id*., 296 Wis. 2d at 858. This court must conduct an independent review of the record to determine if a new trial is warranted in the interest of justice. *Id*. at ¶ 12, 296 Wis. 2d at 845. However, the power of discretionary reversal should only be exercised in exceptional cases. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797, 802 (1990) (citations omitted).

In *Lorenz v. Wolff*, 45 Wis. 2d 407, 173 N.W.2d 129 (1970), the court did determine that discretionary reversal was warranted because conduct during the course of the trial prevented the jury from fairly considering a crucial issue before the court. *See Vollmer*, 156 Wis. 2d at 17,

456 N.W.2d at 804 (finding that the Supreme Court's power of discretionary reversal under Wis. Stat. § 751.06 is identical to Court of Appeals power of discretionary reversal under Wis. Stat. § 752.35). In *Lorenz*, defense counsel's questioning of the plaintiff became defense counsel's own testimony regarding something he purportedly witnessed. *Id*. at 416-18, 173 N.W.2d at 133-34. The trial court advised the jury that they were to disregard defense counsel's "testimony." *Id*. A short while later, defense counsel requested to be sworn in as a witness but then withdrew the request because he wanted to remain an attorney on the case. *Id*. at 417, 173 N.W.2d at 133. During closing arguments, defense counsel vouched for the truthfulness of the testimony of a witness, who happened to be his son. *Id*. at 418-19, 173 N.W.2d at 134. On review, the Wisconsin Supreme Court reversed the verdict finding that there was a miscarriage of justice because the jury had before it evidence that was not properly admitted at the trial. *Id*. at 426, 173 N.W.2d at 138-39.

The defendant's argument for discretionary reversal under Wis. Stat. § 752.35 can be distinguished from the circumstances that led to the reversal in *Lorenz*. One very important difference is that in *Lorenz*, the jury heard prejudicial evidence **during the trial**. Aside from the court's

instruction that the jury disregard the defense attorney's statements, there was nothing to distinguish the defense attorney's testimony from the rest of the evidence properly before the jury. That error was compounded when the attorney requested to testify as a witness and when he vouched for his son's character, all of which occurred while the trial was in progress. Conversely, all the errors claimed by the defendant occurred during *voir dire*, prior to the start of evidence. There was no co-mingling of inadmissible prejudicial statements and evidence the jury was allowed to consider.

In addition, before the jurors began their deliberation, the court gave jury instructions, including Wis. JI Criminal 103, which states:

> Evidence is: First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness. Second, the exhibits the court has received, whether or not an exhibit goes to the jury room. Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find. Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.
> Wis. JI Criminal 103 and R.103 at 257.

The jury is presumed to have followed the court's instructions. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). However, in *Lorenz*, the ability for the jury to follow the court's instruction was made considerably more difficult by the fact that inadmissible prejudicial

testimony and properly admitted evidence was presented to them at the same time. Conversely, in this case, there was no need for the jury to weed through the evidence to determine what was proper for them to consider. It was made clear, through the court's instruction, that the statements they heard during *voir dire* were not considered evidence.

Furthermore, unlike defense counsel's "testimony" in *Lorenz*, which was evidence not properly before the court, the prejudicial statements Attorney Keane elicited from prospective jurors resulted from *voir dire* proceedings that properly functioned to screen out biased jurors. As such, this is not the kind of case or set of circumstances that warrant the extraordinary remedy of discretionary reversal under Wis. Stat. § 752.35.

CONCLUSION

Trial counsel's performance was not deficient because she successfully and correctly used the *voir dire* proceedings to screen out biased jurors. Likewise, the defendant cannot meet her burden of showing she was prejudiced by what occurred during *voir dire* because the only evidence she offers to support that claim amounts to speculation. Furthermore, the defendant was not deprived of her right to due process as the *voir dire* proceedings functioned properly to weed out biased jurors.

Finally, this case does not present the extraordinary set of circumstances for which this court should exercise its broad power of discretionary reversal. The jury was properly instructed of what evidence it could consider to reach a verdict, there was nothing about the facts and circumstances of the trial that would make that instruction difficult to follow, and *voir dire* proceedings were properly conducted in a manner that made it possible for the court to screen out prospective jurors that were biased. Based on the foregoing, the State respectfully requests that this court affirm the verdict.

Dated this 17th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,092 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 17th day of December, 2014.

Respectfully submitted,

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